



COMMONWEALTH OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

A GUIDE TO

PUBLIC ACCESS,
SEALING &
EXPUNGEMENT

OF DISTRICT COURT RECORDS

REVISED MAY, 2007

"Every inhabitant of the Country shall have free liberty to search and review any rolls,
records or registers of any Court or office"

MASSACHUSETTS BODY OF LIBERTIES, art. 48 (1641)

ADMINISTRATIVE OFFICE OF THE DISTRICT COURT

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I. PUBLIC ACCESS TO COURT RECORDS

1. General Principles

1. **PUBLIC RECORDS STATUTES DO NOT APPLY TO COURT RECORDS.** The Commonwealth's general public records statutes¹ do not apply to records of the judicial branch.²

2. **COURT RECORDS ARE PRESUMPTIVELY OPEN TO THE PUBLIC.** "In Massachusetts, the right of public access to judicial records is governed by overlapping constitutional, statutory, and common-law rules."³ There is a common law "general principle of publicity" that court records are presumptively open to the public.⁴ For some types of records, this qualified right is also secured by the First Amendment.⁵

¹ G.L. c. 4, § 7, Twenty-Sixth (defining "public records") and G.L. c. 66, § 10 (guaranteeing public access to public records). See also G.L. c. 66A (Fair Information Practices Act).

² *Kettenbach v. Board of Bar Overseers*, 448 Mass. 1019, 1020, 863 N.E.2d 36, 38 (2007); *Lambert v. Executive Director of the Judicial Nominating Council*, 425 Mass. 406, 409, 681 N.E.2d 285, 287 (1997); *New Bedford Standard-Times Pub. Co. v. Clerk of the Third Dist. Court of Bristol*, 377 Mass. 404, 407, 387 N.E.2d 110, 112 (1979); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 545-546, 362 N.E.2d 1189, 1194 (1977); *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 157, 61 N.E.2d 5, 6 (1945); *Peckham v. Boston Herald, Inc.*, 48 Mass. App. Ct. 282, 286 n.6, 719 N.E.2d 888, 892 n.6 (1999). General Laws c. 66A, § 1 (Fair Information Practices Act limited to executive branch agencies and legislatively-created authorities). 801 Code Mass. Regs. § 2.01(2)(f) ("Freedom of Information" regulations [801 Code Mass. Regs. § 2.00 et seq.] limited to executive branch agencies); 950 Code Mass. Regs. § 32.03 (1986) (public records regulations inapplicable to judicial branch).

The Superintendent of Public Records has also ruled that "[t]he statutory definition of Public Records, G.L. c. 4, § 7(26) . . . does not include court records." Letter from James W. Igoe, Superintendent of Public Records, to Robert V. Unger, Managing Editor, Holyoke Transcript/Telegram (July 17, 1987) (denying request for access to complaint letters sent to departmental Chief Justice's office).

³ *Commonwealth v. Silva*, 448 Mass. 701, 706, 864 N.E.2d 1, 5 (2007).

⁴ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1312 (1978); *New Bedford Standard-Times*, *supra* (records of "judicial proceedings are subject to the 'general principle of publicity'"); *Ottaway Newspapers*, *supra* ("Here we acknowledge, and we affirm with emphasis, . . . the 'general principle of publicity'" for records of judicial proceedings); *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.3d 404, 409 (1st Cir. 1987) ("documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *Commonwealth v. Blondin*, 324 Mass. 564, 571, 87 N.E.2d 455, 460 (1949), cert. denied, 339 U.S. 984 (1950) (statutes denying access to judicial proceedings must "be strictly construed in favor of the general principle of publicity").

⁵ In general, the Supreme Court has "articulate[d] a two-part test for determining whether a First Amendment right of access applies to any particular proceeding. First, the proceeding must have an historic tradition of openness, and second the public's access must play 'a significant positive role in the functioning of the particular process in question.'" *Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dep't*, 403 Mass. 628, 635, 531 N.E.2d 1261 (1988), cert. denied, 490 U.S. 1066 (1989) (common law, but not First Amendment, establishes a presumptive right of access to returned search warrants prior to trial of accused), quoting from *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S.Ct. 2735, 2740 (1986).

3. **THE “PUBLIC” INCLUDES EVERYONE.** The presumptive right of public access extends to all members of the public, and cannot be restricted only to certain groups such as attorneys⁶ or non-commercial users.⁷ Persons wishing to see publicly-available records cannot be required to identify the purpose for their request.⁸

4. **THE RIGHT OF ACCESS INCLUDES ACCESS TO AUDIO RECORDINGS.** The public’s presumptive right of access includes the right to obtain at normal rates⁹ copies of the audio recording of a proceeding that was open to the public.¹⁰

⁶ “Access to public records shall not be restricted to any class or group of persons.” Trial Court Administrative Directive No. 2-93, “Public Access to Court Records of Criminal Proceedings” (April 27, 1993) (reproduced as Appendix D at p. 35). Accord, Trial Court Administrative Directive No. 1-84, “Public Access to Court Records” (March 21, 1984) (same); Memorandum of Trial Court Chief Administrative Justice Arthur M. Mason, “Access to Court Records” (August 21, 1981) (“Where a record is a public record, access should be given to all the public, not only to attorneys”).

⁷ See, e.g. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.), cert. denied, 513 U.S. 1044 (1994) (statute barring access to criminal records for commercial purposes violates First Amendment); *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) (same); *Babkes v. Satz*, 944 F.Supp. 909 (D. S.Fl. 1996) (statute barring use of traffic citation information for commercial solicitation purposes violates First Amendment); *United Reporting Publishing Corp. v. Lungren*, 946 F.Supp. 822 (D. S.Cal. 1996) (statute barring release of arrestees’ addresses for commercial solicitation purposes violates First Amendment). But cf. *Los Angeles Police Dep’t v. United Reporting Publishing Corp.*, 528 U.S. 32, 120 S.Ct. 483 (1999) (California statute prohibiting release of arrestees’ addresses for commercial use not subject to First Amendment facial challenge).

⁸ Where there is a statutory right of access to executive branch records under the public records act (G.L. c. 66, § 10), the custodian may not inquire as to why public records are sought. *Bougas v. Chief of Police of Lexington*, 371 Mass. 59, 64, 354 N.E.2d 872, 877 (1976) (“It appears that the statute . . . extends the right to examine public records to ‘any person’ whether intimately involved with the subject matter of the records he seeks or merely motivated by idle curiosity.”); *Direct-Mail Svce., Inc.*, 296 Mass. at 356, 5 N.E.2d at 546 (“We cannot believe that the legislature intended to give to the custodian of a public record power to inquire of applicants for inspection as to the use which they intend to make of the information to be obtained or the motives which prompted them in seeking it.”). Accord, *Antell v. Attorney General*, 52 Mass. App. Ct. 244, 245 n.1, 752 N.E.2d 823, 824 n.1 (2001); *Cunningham v. Health Officer of Chelsea*, 7 Mass. App. Ct. 861, 862, 385 N.E.2d 1011, 1012-1013 (1979). The requester’s motive is also generally irrelevant to any right of access based on the First Amendment. *United States v. Adodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

When a judge decides whether to impound information, the requester’s motivation is irrelevant in determining the public interest served by disclosure, but may be relevant to whether private interests could be harmed by disclosure. *Doe v. Registrar of Motor Vehicles*, 26 Mass. App. Ct. 415, 427 n.22, 528 N.E.2d 880, 887 n.22 (1988).

The U.S. Supreme Court has not reached whether a state may forbid the commercial use of arrest data. See *Los Angeles Police Dep’t v. United Reporting Pub. Corp.*, 528 U.S. 32, 120 S.Ct. 483 (1999).

⁹ The current fee for cassette or CD copies is \$50.50 per ninety minutes of recording or part thereof, plus postage. Administrative Office of the Trial Court, “Uniform Schedule of Fees for the Trial Court as Provided for by Massachusetts General Laws Chapter 262, Section 4B” (revised December 1, 2005). Waivers for indigent litigants may be available under G.L. c. 261, §§ 27A-29. See District Court Special Rule 211(A)(5)(c).

¹⁰ “Any person, whether or not a party, shall be permitted to obtain a cassette copy of an original recording, or any portion thereof, of any proceeding which was open to the public, unless the record of such proceeding has been sealed or impounded.” District Court Special Rule 211(A)(5)(a). The First Amendment right of access includes access to the transcript of proceedings. *Republican Co. v. Appeals Court*, 442 Mass. 218, 223 n.8, 812 N.E.2d 887, 892 n.8 (2004).

5. **THE RIGHT OF ACCESS INCLUDES THE RIGHT TO COPY.** The public's presumptive right of access generally includes the right to make notes, and to obtain photocopies¹¹ at normal rates.¹²

6. **CLERK-MAGISTRATES MUST FACILITATE THE RIGHT OF ACCESS, SUBJECT TO REASONABLE TIME AND PLACE LIMITS.** Clerk-magistrates and assistant clerks have an ethical obligation "to facilitate public access to court records that, by law or court rule, are available to the public and [to] take appropriate steps to safeguard the security and confidentiality of court records that are not open to the public."¹³ The public's presumptive right of access is subject to reasonable limitations as to time and place that clerk-magistrates may impose to avoid disrupting the orderly functioning of their offices or courtroom proceedings, to protect the physical security of court records, and to guarantee equal access to all inquirers. Such issues can be particularly complex when an inquirer requests access to large volumes of records, but this does not justify denying access at reasonable times and places.¹⁴ District

¹¹ *Nixon*, 435 U.S. at 597, 98 S.Ct. 1312 (common law guarantees general right to "inspect and copy"); *New Boston Garden Corp. v. Board of Assessors of Boston*, 24 Mass. App. Ct. 122, 125, 507 N.E.2d 756, 759 (1987) ("In this day and age, the right of access to a document generally includes the right to make a copy of it."); *Direct-Mail Svce., Inc. v. Registrar of Motor Vehicles*, 296 Mass. 353, 356, 5 N.E.2d 545, 546-547 (1937) (statutory "right to inspect commonly carries with it the right to make copies without which the right to inspect would be practically valueless."). Trial Court Administrative Directive No. 1-89 (November 13, 1989) ("Subject to any applicable fee, the public, the defendant, and the defendant's attorney are entitled to copies of unimpounded documents filed in connection with [an] abuse prevention petition under G.L. c. 209A . . ."). See e.g. *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981) (abuse of discretion to forbid photocopying of publicly-available court record); *United States v. Beckham*, 789 F.2d 401, 412 (6th Cir. 1986) (same).

District Court clerk-magistrates have been requested to honor reasonable requests from other Commonwealth agencies to be mailed certified copies of publicly-accessible criminal records, without requiring their personnel to come to the court. District Court Memorandum, "Division of Registration Requests for Certified Copies of Convictions" (Trans. 625, December 4, 1996).

¹² The current fee for photocopies is \$1.00 per page for unattested copies and \$2.50 per page for attested copies. Administrative Office of the Trial Court, "Uniform Schedule of Fees for the Trial Court as Provided for by Massachusetts General Laws Chapter 262, Section 4B" (revised December 1, 2005). Waivers for indigent litigants may be available under G.L. c. 261, §§ 27A-29.

¹³ Code of Professional Responsibility for Clerks of the Courts, S.J.C. Rule 3:12, Canon 3(A)(6).

¹⁴ *Direct-Mail Svce., Inc.*, 296 Mass. at 357, 5 N.E.2d at 547 ("In order to avoid any misapprehension perhaps we ought to add that the right of an applicant to copy a great mass of records may be circumscribed by physical limitations which are unavoidable if the right itself is to be preserved both for the applicant and for others. No one person can take possession of the [office] or monopolize the record books so as to interfere unduly with the work of the office or with the exercise of equal rights by others, and the applicant must submit to such reasonable supervision on the part of the custodian as will safeguard the safety of the records and secure equal opportunity for all."). See e.g. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 505 (1st Cir. 1989) (First Amendment permits reasonable time, place and manner limitations); *United States v. Gurney*, 558 F.2d 1202, 1210 & n.13 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (permissible for judge to condition inspection of trial exhibits upon clerk's availability); *United States v. Peters*, 754 F.2d 753, 763-764 (7th Cir. 1985) (judge may control mid-trial access to exhibits to extent needed for orderly trial but may not arbitrarily exclude a single reporter from access); *United States v. Edwards*, 672 F.2d 1289, 1296 (7th Cir. 1982) (judge may consider administrative burden and potential trial disruption in evaluating mid-trial request for immediate copies of videotapes introduced as evidence); *United States v. Webbe*, 791 F.2d 103, 107 (8th Cir. 1986) (same); *United States v. Rosenthal*, 763 F.2d 1291, 1294-1295 (11th Cir. 1985) (same); *Bend Pub. Co. v. Haner*, 118 Or. 105, 244 P. 868 (1926) (access to clerk's records may be subject to limitations necessary to safeguard records and avoid interference with clerk's other duties). See also G.L. c. 268A, § 23(b)(3) (state employee may not give reasonable impression that any person can "unduly enjoy his favor in the performance of his official duties").

Clerk-magistrates often receive correspondence, many times from out of state, asking whether one or more named persons have criminal records in that court. Such requests should be fulfilled when they are from government agencies. See n.11, second par., *supra*. Where available resources make it impossible to fulfill such requests from members of the general public, a response such as the following may be utilized:

"Dear _____:

"This office has received your inquiry about Massachusetts criminal records.

"As required by statute, this office maintains an alphabetical index of adult criminal defendants against whom criminal complaints have been issued in this court, except for sealed or impounded cases. That index is available in this office for public inspection during normal

Court employees may not accept outside compensation to search the records of their own court during their off-hours.¹⁵

7. FIRST EXCEPTION TO PRESUMPTION OF PUBLIC ACCESS: GENERAL STATUTORY IMPOUNDMENTS.

The presumptive common law right of access is subject to general statutory exceptions for certain classes of cases or records¹⁶ if these are constitutionally permissible.¹⁷

8. SECOND EXCEPTION TO PRESUMPTION OF PUBLIC ACCESS: SPECIFIC JUDICIAL IMPOUNDMENTS. The presumptive common law right of access is also subject to particular exceptions created by a judge's impoundment

business hours from 8:30 A.M. to 4:30 P.M. daily. The index indicates the docket number for each case, which may then be used to request access to or photocopies of the docket sheet or other documents in our file for that case. In fairness to other inquirers and to avoid disrupting the other work of the court, we request that advance arrangements be made by large-volume inquirers.

"Because of the volume of such inquiries, we regret that normally we are not able to answer telephone or written inquiries from the general public about specific names.

"Please note that our index is confined to criminal cases in this court, and does not include cases from any other Massachusetts court. Massachusetts law (G. L. c. 6, § 172 and 803 Code Mass. Regs. § 3.06) permits limited public access to compiled, statewide criminal records. Such public access is available through the:

Criminal History Systems Board
200 Arlington Street, Suite 2200, Chelsea, MA 02150
(617) 660-4600 website: www.state.ma.us/chsb

"Sincerely,
"Mary M. Moe
"Clerk-Magistrate."

¹⁵ "*Personnel: Working for credit reporting services.* Personnel in some courts have been approached by credit reporting services seeking to hire them on a piecework basis. These services gather and summarize information on civil litigants, and are seeking to hire court employees to fill out in the courthouse, during their lunch breaks or after work, a questionnaire on each recent civil judgment.

"Court employees may not accept such employment. It may be that such lunchtime employment would violate G.L. c. 30, § 43, which makes it a misdemeanor for a public employee to 'receive for his own use any fee for copying public records or documents, or for other services during office hours.' Such employment may also violate the code of conduct in the State Ethics Act (G.L. c. 268A, § 23) if it involves access to parts of the courthouse, or during hours, not open to the general public.

"In any case, such employment, even if limited to lunchtime or after hours, is bound to raise an appearance that such credit reporting services have a favored relationship to the clerk-magistrate's office. The Trial Court's *Personnel Policies and Procedures Manual*, § 8.100 forbids Trial Court employees from maintaining outside employment that will 'result in a conflict of interest' or 'subject the Trial Court to public criticism or embarrassment.'

"Because of the high potential for conflict of interest, no court employee should accept any outside employment that involves work during the lunch hour, or in the courthouse, without written permission from the Trial Court's personnel department. Clerk-magistrates should bring this matter to their subordinates' attention." Dist. Ct. Bltn. 3-90, item 43 (Trans. 360, October 4, 1990).

¹⁶ *New Bedford Standard-Times*, 377 Mass. at 410-412, 387 N.E.2d at 113-115 (statutes limiting public access to court records do not violate separation of powers if they do not interfere impermissibly with the internal functioning of the court); *Ottaway Newspapers*, 372 Mass. at 546, 362 N.E.2d at 1194 ("At the same time there are statutes which, for a variety of reasons that can be surmised, limit, or authorize limitation of access to court proceedings and official records.")

¹⁷ For an example of a Massachusetts statutory impoundment that was held, in part, to violate the First Amendment, see *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989) (First Amendment bars sealing of criminal acquittals and dismissals under G.L. c. 276, § 100C except where a compelling government interest is shown.).

of particular records or information in individual cases. While such impoundment power is inherent in the judiciary,¹⁸ it may be exercised only sparingly and for good cause.¹⁹ Since the scope of an impoundment must be limited to the need, in an appropriate case this might require redaction and selective impoundment.²⁰ In determining whether there is good cause for impoundment, a judge must balance the privacy interests at issue against the competing presumption of public access. Since the legal standard to be applied may vary with the facts of the case,²¹ judicial impoundment of records normally must be supported by specific findings of fact and rulings of law.²² The impoundment procedures in the Trial Court's Uniform Rules on Impoundment Procedure must be observed both in civil²³ and criminal²⁴ cases.

¹⁸ *Nixon*, 435 U.S. at 597-599, 98 S.Ct. at 1312-1313 ("Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."); *Commonwealth v. Mitchell*, 444 Mass. 786, 795, 831 N.E.2d 890, 896 (2005) ("A judge also has some measure of inherent authority, in appropriate circumstances and on a showing of good cause, to issue protective orders, or to seal or impound any motion or affidavit submitted to the court, in connection with a civil or criminal proceeding."); *Doe v. Commonwealth*, 396 Mass. 421, 423, 486 N.E.2d 698, 700 (1985) (within constitutional limits, Superior Court judge may consider impounding case papers in criminal contempt trial of juvenile); *George W. Prescott Pub. Co. v. Register of Probate for Norfolk County*, 395 Mass. 274, 277, 479 N.E.2d 658, 662 (1985) (It is the SJC's "long-standing view that a court has inherent equitable power 'to impound its files in a case and to deny public inspection of them . . . when justice so requires'"), quoting from *Sanford*, 318 Mass. at 158, 61 N.E.2d at 6; *New Bedford Standard-Times*, 377 Mass. at 410, 387 N.E.2d at 114 ("judges may exercise discretion to impose reasonable cloture, including impoundment" over court records not withheld by statute); *Ottaway Newspapers, supra* (statutory impoundment provisions "do not preclude the exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary . . .").

¹⁹ *Republican Co. v. Appeals Court*, 442 Mass. 218, 223, 812 N.E.2d 887, 892 (2004) ("The exercise of the power to restrict access, however, must recognize that impoundment is always the exception to the rule, and the power to deny public access to judicial records is to be 'strictly construed in favor of the general principle of publicity'"); *Ottaway Newspapers*, 372 Mass. at 552, 362 N.E.2d at 1197 ("[W]e do not suggest that impoundment orders may be lightly granted The 'general principle of publicity' remains, and it is only in a clearly meritorious case that impoundment can be contemplated").

²⁰ *H.S. Gere & Sons, Inc. v. Frey*, 400 Mass. 326, 329, 509 N.E.2d 271, 273 (1987) (judge "must tailor the scope of the impoundment order so that it does not exceed the need for the impoundment"); *Ottaway Newspapers*, 372 Mass. at 550 n.17, 362 N.E.2d at 1196 n.17 ("the scope of an impoundment should not in any case exceed the need").

²¹ Contrast, for example, *H.S. Gere & Sons, Inc.*, 400 Mass. at 330, 509 N.E.2d at 274 (ordinarily a legitimate expectation of privacy constitutes good cause for impoundment of settlement agreement in civil case), with *George W. Prescott Pub. Co., supra*, (in a divorce case, impoundment of materials relevant to a public official's potential conduct in office is permissible only for overriding necessity based on specific findings).

²² See *Pokaski, supra* (sealing criminal record of acquittal or dismissal must be supported by specific findings and rulings that in the particular case a compelling government interest outweighs the presumption of public access); *Globe Newspaper Co. v. Commonwealth*, 407 Mass. 879, 886-887, 556 N.E.2d 356, 361 (1990) (judge impounding transcript of post-trial hearing in criminal case must make written findings of fact); Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, Rule 8 (in civil case, "[a]n order of impoundment, whether ex parte or after notice, may be made only upon written findings") (reproduced as Appendix B).

²³ Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, Rule 1 ("These rules govern impoundment in civil proceedings in every Department of the Trial Court"). The Uniform Rules do not govern the impoundment process where impoundment is required by statute, court rule, or standing order, but they do apply to subsequent requests for access to such impounded materials. *Care & Protection of Sharlene*, 445 Mass. 756, 772 & n.18, 840 N.E.2d 918, 930 & n.18 (2006); Uniform Rule 11.

In an ongoing civil action, a nonparty should seek access to impounded material by means of a motion to intervene, and thereafter seek appellate review from an Appeals Court single justice pursuant to Rule 12 of the Uniform Rules on Impoundment Procedure. In an already-concluded civil action, a nonparty should file a separate "civil action in the court which issued [the impoundment order], joining the clerk of that court in his official capacity and the parties to the action or at least any who obtained or may defend the order," which action will "end in a judgment capable of appeal under ordinary rules." *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 596 n.7, 737 N.E.2d 859, 862 n.7 (2000); *Ottaway Newspapers, Inc. v. Appeals Court*, 372 Mass. 539, 551, 362 N.E.2d 1189, 1196-1197 (1977).

A nonfrivolous request to modify or terminate an impoundment order because good cause no longer exists for such impoundment may be made at any time. "Once entered, an impoundment order remains an interlocutory order, subject to the continued existence of 'good cause' Unlike other orders and judgments, an impoundment order carries no continuing presumption of validity to sustain it against a proper challenge subsequently brought. A party seeking the release of impounded court records does not bear the burden of demonstrating either

In deciding whether there is “good cause” for impoundment under the Uniform Rules, a judge must take into account essentially the same factors as required by the First Amendment, and no separate constitutional analysis is necessary.²⁵

9. THE CORI LAW DOES NOT LIMIT ACCESS TO CLERK’S RECORDS. The restrictions found in the Criminal Offender Record Information Act²⁶ on disseminating criminal records are inapplicable to records (case files, docket books, daily trial lists, and defendant indexes) maintained by a clerk-magistrate’s office.²⁷ The CORI law does not prevent a court from releasing warrant information²⁸ or specified summary information regarding a criminal sentence of incarceration or probation.²⁹ Nor does it prevent a judge from permitting the probation department to

that there has been a material change in circumstances or that whatever good cause may once have justified their impoundment no longer exists. The burden of demonstrating the existence of good cause always remains with the party urging their continued impoundment . . . [W]henver the party seeking to modify the order comes forward with a nonfrivolous reason to do so . . . the obligation of the motion judge is to apply the same balancing test used in determining whether to grant an impoundment order in the first instance The . . . concern that a party who has secured impoundment on Monday afternoon should not have to return to court on Tuesday morning to make the same case once again is understandable. However, we are confident that judges will be able to separate frivolous, repetitive, or harassing motions from those that are not, and that parties who have secured impoundment for a certain term will not during that term be required repeatedly to make their case absent a real possibility that the good cause that once supported impoundment has in some manner become less pressing. Such screening is a consummate function of trial judges” (citations omitted). *Republican Co. v. Appeals Court*, 442 Mass. 218, 223-226, 812 N.E.2d 887, 893-894 (2004).

²⁴ See *Republican Co.*, 442 Mass. at 225 n.11 & 227 n.14, 812 N.E.2d at 893 n.11 & 895 n.14 (while uniform rules do not strictly apply, impoundment practice in criminal cases “should hew as closely as possible to the protocol described by the uniform rules”); *Globe Newspaper Co. v. Commonwealth*, 407 Mass. 879, 886-887, 556 N.E.2d 356, 361 (1990) (citing rules in reviewing impoundment of transcript of post-trial hearing in criminal case); *Newspapers of New England, Inc.*, 403 Mass. at 632, 531 N.E.2d at 1263-1264 (citing rules in reviewing impoundment of search warrant).

In a criminal case, a nonparty seeking access to impounded material in an ongoing criminal case should file a motion and affidavit to be heard in that case, and must give “the Attorney General . . . notice of, and an opportunity to be heard on, any motion filed in any court by a nonparty to obtain access to impounded documents in a criminal case.” Appellate review may thereafter be sought from an Appeals Court single justice pursuant to Rule 12 of the Uniform Rules on Impoundment Procedure. If there is no ongoing proceeding, a nonparty should bring a separate civil action in the court that issued the impoundment order, “joining the clerk of that court in his official capacity and the parties to the action or at least any who obtained or may defend that order,” which action will “end in a judgment capable of appeal under ordinary rules.” *Commonwealth v. Silva*, 448 Mass. 701, 703-706, 864 N.E.2d 1, 4-5 (2007); *Republican Co. v. Appeals Court*, 442 Mass. 218, 227 n.14, 812 N.E.2d 887, 895 n.14 (2004).

²⁵ *Commonwealth v. Silva*, 448 Mass. at 707, 864 N.E.2d at 6.

²⁶ G.L. c. 6, §§ 167-178B.

²⁷ Case files, docket books, and daily trial lists are exempted from the CORI law because they are “chronologically maintained court records of public judicial proceedings” G.L. c. 6, § 172. *Globe Newspaper Co. v. District Att’y for the Middle Dist.*, 439 Mass. 374, 788 N.E.2d 513 (2003).

Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993), enjoined enforcement of the provision of § 172 requiring that “no alphabetical or similar index of criminal defendants is available to the public, directly or indirectly” in a clerk-magistrate’s office, holding that it violated the First Amendment.

The CORI law does not apply to juvenile delinquency records, see G.L. c. 6, § 167 and 803 Code Mass. Regs. § 2.04(2), or to records of civil motor vehicle infractions, other civil infractions, or minor criminal offenses not punishable by incarceration, see G.L. c. 6, § 167 and 803 Code Mass. Regs. § 2.04(9).

²⁸ By regulation of the Criminal History Systems Board, courts and other criminal justice agencies “may disseminate CORI that is specifically related to and contemporaneous with the search for or apprehension of any person” 803 Code Mass. Regs. § 2.04(5)(b).

²⁹ By regulation of the Criminal History Systems Board, courts and other criminal justice agencies “with the primary responsibility for the creation and/or maintenance of that information, shall make available to any person upon request information indicating custody status and placement within the criminal justice system. No information shall be disclosed that identifies family members, medical or psychological history, or any other personal information unless such information is directly relevant to release or custody placement decision, and no

release a summary of why a criminal defendant has been released or denied release.³⁰

The CORI law continues to limit public access to *compiled* criminal records about an individual, such as his or her statewide CARI (Criminal Activity Record Information) record. (This is sometimes referred to as a person's "BOP" [Board of Probation] or "central probation" record.) The law currently provides for limited public access to such records through the Criminal History Systems Board (see Appendix A).

10. PARTIES AND THEIR ATTORNEYS GENERALLY HAVE ACCESS TO RECORDS OF THEIR OWN CASES EVEN IF NOT PUBLICLY AVAILABLE. With some exceptions, the parties to a case and their attorneys of record in that case are generally entitled to inspect and copy the court records of that case, even if those records are not available to the public.³¹

information shall be provided if its release would violate any other provisions of state or federal law. Custody status and placement shall include, for the purposes of 803 CMR 2.04(5)(c)2., any information indicating that a criminal offender currently: (a) is on probation; or (b) is subject to particular special conditions of probation; or (c) is in compliance or non-compliance with particular special conditions of probation, including whether an offender is a participant in a court ordered rehabilitation or educational program; or (d) is confined in a particular institution; or (e) is confined at a particular level of security; or (f) is eligible for parole on an estimated date; or (g) has begun parole supervision on a specified date, and has ended, or is expected to end parole supervision on a specified date; or (h) is subject to certain conditions of parole." 803 Code Mass. Regs. § 2.04(5)(c)(2).

³⁰ See n.94, *infra*.

³¹ G.L. c. 221, § 48 ("Parties may manage, prosecute or defend their own suits personally, or by such attorneys as they may engage"); Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, Rule 9 ("All impounded material . . . shall not be available for public inspection. Such impounded material shall be available to the court, the attorneys of record, the parties to the case, and the clerk, unless otherwise ordered by the court"); District Court Special Rule 211(A)(5) ("Counsel for any party, or any party who has entered an appearance pro se, shall be permitted to obtain a cassette copy of [any proceeding which was not open to the public] upon certifying that such cassette copy will be used solely for an appeal, or to determine whether to claim an appeal, in the same manner. Unless the judge who presided over the proceeding has ordered otherwise, the clerk-magistrate shall provide such cassette copy upon such certification without requiring a judge's approval of the request.").

See, e.g., G.L. c. 38, § 8 (any person identified by attorney general or district attorney as target of investigation has right to examine inquest report); G.L. c. 119, § 60A (juvenile delinquency records "shall be open, at all reasonable times, to inspection by the child proceeded against, his parents, guardian or attorney; provided further, that nothing herein shall be construed to provide access to privileged or confidential communications and information"); G.L. c. 123, § 36A ("any person who is the subject of [a mental health] examination or a commitment proceeding, or his counsel, may inspect all reports and papers filed with the court in a pending proceeding, and the prosecutor in a criminal case may inspect all reports and papers concerning commitment proceedings that are filed with the court in a pending case"); G.L. c. 209A, § 8, first. par. (where either party to abuse restraining order is a minor, the "records shall be open, at all reasonable times, to the inspection of the minor, said minor's parent, guardian, attorney, and to the plaintiff and the plaintiff's attorney"); G.L. c. 209A, § 8, second par. (in records of abuse restraining order, plaintiff's residential and workplace addresses and phone numbers not open to public access except by court order, but "shall be accessible at all reasonable times to the plaintiff and plaintiff's attorney, to others specifically authorized by the plaintiff to obtain such information, and to prosecutors, victim-witness advocates . . . , domestic violence victim's counselors . . . , sexual assault counselors . . . , and law enforcement officers, if such access is necessary in the performance of their duties," and the plaintiff's residential or workplace addresses "shall [be] accessible to the defendant and the defendant's attorney" if they appear on the order); Mass. R. Crim. P. 28(d)(3) (presentence reports shall be available to counsel except for portions impounded by sentencing judge, but "[n]o party may make any copy of the presentence report"); "Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees and Costs" form, reproduced at 803-805 Mass. Dec. XXIX and <http://www.jud.state.ma.us/courtsandjudges/courts/supremejudicialcourt/affmemo1.htm> (effective May 5, 2003) (providing that "By order of the Supreme Judicial Court, all information in this affidavit is CONFIDENTIAL. Except by special order of a court, it shall not be disclosed to anyone other than authorized court personnel, the applicant, applicant's counsel or anyone authorized in writing by the applicant").

2. Criminal Cases

PUBLICLY AVAILABLE:

- *Alphabetical index.* Alphabetical index of cases, whether active or closed, with exceptions below.³²
- *Dockets and case files.* Dockets and contents of case files,³³ with exceptions below.
- *Copies of the audio recording* of proceedings,³⁴ with exceptions below.
- *Daily trial lists,*³⁵ with exceptions below.
- *Jenkins determinations.* Written determinations of probable cause or no probable cause under Mass. R. Crim. P. 3.1 and Trial Court Rule XI, and police reports and other materials submitted in support of such determinations.³⁶

³² “The alphabetical indices of the names of defendants in criminal cases which clerk-magistrates are obligated to maintain pursuant to G.L. c. 221, § 23 shall be available to the public except as to those cases which have been sealed or impounded.” Trial Court Administrative Directive No. 2-93 (April 27, 1993) (reproduced as Appendix D).

The printed alphabetical “Public Index” produced by the District Court’s criminal case management system, MassCourts Lite, does not include sealed or impounded cases.

³³ Trial Court Administrative Directive No. 2-93 (April 27, 1993) (“Docket books of criminal cases are public records and are available for public inspection. Case files are public records and are available for public inspection unless otherwise restricted by law or unless they have been sealed or impounded.”) (reproduced as Appendix D). The CORI law is inapplicable to case files of the clerk-magistrate’s office. See n.27, *supra*. The bail “Recognizance” (DC-CR-5) form, the “Notice to Sex Offender under Probation Supervision of Duty to Register” (AOTC-13) form used to implement G.L. c. 6, § 178E(c), and the “Notice to Offender of Duty to Provide a DNA Sample Within 90 Days of Conviction of a Chapter 22E, Sec. 3 Offense” (AOTC-16) form used to implement G.L. c. 22E, § 3, are to be filed in the court case file. See, respectively, Trial Court Fiscal Systems Manual § 9.4(6) (effective July 1, 1996); Memorandum from Trial Court Chief Justice for Administration and Management John J. Irwin, Jr., “St. 1996, Chapter 239, An Act Relative to Sex Offender Registration and Community Notification” (September 16, 1996) (distributed as Trans. 614); and Memorandum from Trial Court Chief Justice for Administration and Management John J. Irwin, Jr., “Notice to Offenders Required to Provide DNA Sample” (December 26, 1997) (distributed as Trans. 662). These three forms are therefore publicly accessible.

Public release of motor vehicle information found in criminal and civil motor vehicle infraction (CMVI) records does not violate the Driver’s Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725. That statute prohibits further disclosure of most information obtained from “a State department of motor vehicles” (§ 2721[a]) that “identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information” (§ 2725[3]). Such information in court files falls under the statutory exception for “information on vehicular accidents, driving violations, and driver’s status” (§ 2725[3]). Additionally, most of it is derived from the motorist or the police, rather than from Registry of Motor Vehicles records.

³⁴ See n.10, *supra*.

³⁵ The CORI law is inapplicable to daily trial lists. See n.27, *supra*.

³⁶ Mass. R. Crim. P. 3.1(e) & (f) (where defendant arrested without warrant and held, judicial officer’s determination that there is probable cause “shall be filed with the record of the case together with all the written information submitted by the police”; any determination that there is no probable cause and order of release “shall be filed in the District Court having jurisdiction over the location of the arrest, together with all the written information submitted by the police. These documents shall be filed separately from the records of criminal and delinquency cases, but shall be public records”); Trial Court Rule XI, Uniform Rule for Probable Cause Determinations for Persons Arrested Without a Warrant (e)(1)-(3) (where defendant arrested without warrant and held, judicial officer’s determination that there is probable cause, and any written statement of facts submitted in course of such determination “shall be filed and docketed with the record of such case, and shall be a public record”; any determination that there is no probable cause and any written statement of facts submitted in course of such determination, “shall be filed separately from the records of criminal and delinquency cases, but shall be a public record”). See generally

PUBLICLY AVAILABLE, cont'd.

- *Materials submitted in support of a criminal complaint.* Applications, police reports and other materials submitted to a clerk or judge in support of, or in opposition to, a criminal complaint that was subsequently issued.³⁷
- *Exhibits* put in evidence that are in the clerk's custody,³⁸ with exceptions below.
- *Jury pool names, addresses, and dates of birth.* Names, addresses and dates of birth of members of the jury venire, unless impounded by a judge.³⁹
- *Juror names and address.* Names and addresses of impaneled petit jurors are probably publicly available, unless impounded by a judge.⁴⁰

Jenkins v. Chief Justice of the Dist. Court Dep't, 416 Mass. 221, 619 N.E.2d 324 (1993); *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661 (1991).

³⁷ See Mass. R. Crim. P. 3(g) ("The complainant shall convey to the court the facts constituting the basis for the complaint. The complainant's account shall be either reduced to writing or recorded"). Materials submitted in support of an application for criminal complaint that is still pending or has been denied are presumptively not publicly available. See p. 16.

³⁸ See, e.g. *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir. 1987) ("[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies"); *United States v. Myers*, 635 F.2d 945 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *United States v. Beckham*, 789 F.2d 401 (6th Cir. 1986); *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989); *United States v. Webbe*, 791 F.2d 103 (8th Cir. 1986); *In re Application of Nat'l Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981). Most Federal circuits recognize a presumptive public right to copies of audiotapes or videotapes introduced in evidence at trial. See *In re National Broadcasting Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993); *United States v. Myers*, 635 F.2d 945, 952 (2d Cir. 1980); *United States v. Criden*, 648 F.2d 814, 823 (3d Cir. 1981); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 434 (5th Cir. 1981); *United States v. Edwards*, 672 F.2d 1289, 1294 (7th Cir. 1982). But see *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996), cert. denied sub nom. *Citizens United v. United States*, 522 U.S. 809, 118 S.Ct. 49 (1997) (no public right to videotaped deposition played at criminal trial, even if introduced in evidence).

There is, of course, no obligation on the court to retain trial exhibits in order to make them publicly accessible. Exhibits are routinely returned to the offering party once the appeal period has expired, and judges may authorize this even during trial. See Dist. Ct. Bltn. 3-84, item 10 (Trans. 40, November 26, 1984). Controlled substances offered as exhibits are to be returned to the police evidence officer at the conclusion of trial and, after the expiration of the appeal period, ordered to be forfeited and destroyed. G.L. c. 94C, § 47A; "Trial Court Policy on the Return of Seized Controlled Substances and Narcotic Drugs to Police Evidence Officer" (Trans. 935, Item 1, December 6, 2006). Business records produced under G.L. c. 233, § 79J and hospital records produced under § 79 are to be returned to the offering party "upon completion of such trial or hearing." In criminal cases subpoenaed records "shall be retained by the clerk of court until the conclusion of any direct appeal following a trial or dismissal of a case." *Commonwealth v. Dwyer*, 448 Mass. 122, 150, 859 N.E.2d 400, 423 (2006).

³⁹ "Unless the court orders otherwise, the list [of venire members prepared by the Jury Commissioner, containing prospective jurors' names, addresses and dates of birth] shall be available upon request for inspection by parties, counsel, their agents, and members of the public." G.L. c. 234A, § 67.

⁴⁰ There is no statutory right of public access to the names of seated jurors, and Massachusetts appellate courts have not yet determined the scope of any public right of access to the names of seated jurors (as distinguished from the jury venire). Impoundment of jurors' identities has been upheld in a case where there was identified and justifiable concerns regarding their safety. *Commonwealth v. Silva*, 448 Mass. 701, 706-710, 864 N.E.2d 1, 5-7 (2007).

See *In re Baltimore Sun Co.*, 841 F.2d 74 (4th Cir. 1988) (public has common law right to list of names and addresses of petit jurors, even if names were disclosed in open court); *United States v. Doherty*, 675 F.Supp. 719 (D.Mass. 1987) (Young, J.) (public has First Amendment right to list of jurors' names and addresses, following 7-day delay to let jurors resume their lives). See also *Sullivan v. National Football League*, 839 F.Supp. 6, 7 (D. Mass.1993) (Harrington, J.) (imposing such a delay for 10 days); *United States v. Butt*, 753 F.Supp. 44 (D.Mass. 1990) (Young, J.) (imposing such a delay for 7 days). Contra, *United States v. Gurney*, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977), cert. denied sub nom. *Miami Herald Pub. Co. v. Krentzman*, 435 U.S. 968 (1978) (public has no right to list of jurors' names and address where names were disclosed in open court), and cases cited at *Silva*, 448 Mass. at 709 n.14, 864 N.E.2d at 7 n.14. See generally *In re Globe Newspaper Co.*, 920 F.2d 88, 97-98 (1st Cir. 1990) (discussing Federal statute requiring release of juror identities except in exceptional circumstances peculiar to case).

- *Sealed cases that do not conform to Pokaski.* The following sealed cases, *unless* they include a judge's findings of fact that there is a compelling governmental interest supporting sealing that outweighs the public's presumptive right of access:
 - "not guilty" or "no probable cause" cases sealed automatically (G.L. c. 276, § 100C)
 - dismissed or nolle prossed cases sealed by a judge (G.L. c. 276, § 100C)
 - dismissed 1st offense marihuana possession cases sealed by a judge (G.L. c. 94C, § 34 or St. 1983, c. 1102, § 1)
 - dismissed 1st offense controlled substance possession cases sealed by a judge (G.L. c. 94C, § 34)
 - dismissed, "not guilty" or nolle prossed controlled substance possession cases sealed by a judge (G.L. c. 94C, § 44).⁴¹

⁴¹ See pp. 42-43 for a chart of statutory sealing provisions and a summary of the requirements of *Globe Newspaper v. Pokaski*, 868 F.2d 497 (1st Cir. 1989). After May 13, 1989, in the listed situations "the public must be given access to criminal case files and audiotape recordings that were previously sealed (either automatically or discretionarily) under § 100C, unless a particular case has been sealed (or re-sealed) by a specific judicial order, accompanied by findings of fact, concluding that in this instance sealing is necessary to effectuate a compelling governmental interest that outweighs the First Amendment presumption of public access. A motion to a judge is *not* required for such access, and should not be required. However, if there is serious uncertainty in a particular case whether the sealing order does or does not meet the requirements of the [*Pokaski*] decision, the clerk-magistrate may place the matter before a judge for a ruling on that issue. As time and resources permit, earlier-sealed records that have been legally unsealed by the First Circuit's decision should also be physically unsealed." District Court Memorandum, "First Circuit decision invalidating major record-sealing provisions of G.L. c. 276, § 100C" at 8 (Trans. 306, May 5, 1989).

NOT PUBLICLY AVAILABLE:

- *Specific impoundments.* Cases, information or materials specifically impounded by a judge.⁴² This may include the *address, phone number, employer or school, of the victim, a victim's family member, or a witness*, if specifically impounded by a judge.⁴³
- *Sexual offense victim's name.* The name of a victim of the following sexual offenses, except on a judge's order:
 - indecent assault and battery on child under 14 (G.L. c. 265, § 13B)
 - rape or aggravated rape (G.L. c. 265, § 22)
 - forcible rape of a child (G.L. c. 265, § 22A)
 - statutory rape (G.L. c. 265, § 23)
 - assault with intent to rape (G.L. c. 265, § 24)
 - assault on child under 16 with intent to rape (G.L. c.265, § 24B).⁴⁴
- *Photographs of unsuspecting nude person.* Photographs and other visual images of an unsuspecting nude or partially nude person from a prosecution for taking or unlawfully disseminating such images.⁴⁵
- *Police reports held only for discovery purposes.* Police reports deposited with the clerk to be given to the defendant as discovery, and not submitted or considered to support the issuance of a criminal complaint or a *Jenkins* probable cause determination.⁴⁶

⁴² See pp. 6-8, *supra*.

⁴³ “[There is a right] for victims and witnesses, to be informed [by the prosecutor] of the right to request confidentiality in the criminal justice system. Upon the court’s approval of such request, no law enforcement agency, prosecutor, defense counsel, or parole, probation or corrections official may disclose or state in open court, except among themselves, the residential address, telephone number, or place of employment or school of the victim, a victim’s family member, or a witness, except as otherwise ordered by the court. The court may enter such other orders or conditions to maintain limited disclosure of the information as it deems appropriate to protect the privacy and safety of victims, victims’ family members and witnesses.” G.L. c. 258B, § 3(h).

⁴⁴ “That portion of the records of a court . . . which contains the name of the victim in an arrest, investigation, or complaint for rape or assault with intent to rape under section thirteen B [indecent assault and battery on child under 14], twenty-two [rape and aggravated rape], twenty-two A [forcible rape of a child], twenty-three [statutory rape], twenty-four [assault with intent to rape] or twenty-four B [assault on child under 16 with intent to rape], inclusive, of chapter two hundred and sixty-five, shall be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted. Said portion of such court record . . . shall not be deemed to be a public record . . .” G.L. c. 265, § 24C. It is undecided whether the statutory directive to withhold “[t]hat portion of the records of a court . . . which contains the name of the victim” is broad enough to authorize the withholding of other information that would directly identify the victim – *e.g.* address or telephone number.

Another statute, G.L. c. 66, § 10, provides that “[t]he home address and telephone number, or place of employment or education of victims of adjudicated crimes . . . and the name and home address and telephone number, or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.” However, § 10 does not govern court records. See n.2, *supra*. No Massachusetts appellate decision has yet considered whether to impose, as a matter of common law, a similar restriction on court records.

⁴⁵ “Any photograph, videotape or other recorded visual image, depicting a person who is nude or partially nude that is part of any court record arising from a prosecution under this section, shall not be open to public inspection and shall only be made available for inspection by court personnel to any law enforcement officer, prosecuting attorney, defendant’s attorney, defendant, or victim connected to such prosecution, unless otherwise ordered by the court.” G.L. c. 272, § 104(g).

⁴⁶ See pp. 10-11, *supra*. “There is no tradition of public access to discovery [materials], and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process.” *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir. 1986) (no common law right of access to discovery materials in civil cases). Accord, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37, 104 S.Ct. 2199, 2209 (1984). See *Commonwealth v. Wanis*, 426 Mass. 639, 642-643, 690 N.E.2d 407, 411 (1998) (whether a document is a public record and whether it is discoverable by a criminal defendant are separate questions).

- *Mental health reports.* Mental health examination and commitment records (G.L. c. 123, §§ 1-18), other than ordinary entries on the criminal docket, except on a judge's order.⁴⁷
- *Alcohol and drug abuser reports.* Alcohol and drug abuser examination and commitment records (G.L. c. 123, § 35), except on a judge's order.⁴⁸
- *Records deposited with the clerk-magistrate as potential exhibits* but not yet introduced in evidence or filed as an attachment to a pleading or motion.⁴⁹
- *Victim impact statements.* Written victim impact statements.⁵⁰
- *Fee waiver applications by indigents.* Applications for waiver of fees or costs for indigents (G.L. c. 261, §§ 27A-29).⁵¹

⁴⁷ "All reports of examinations made to a court pursuant to sections one to eighteen, inclusive . . . shall be private except in the discretion of the court. All petitions for commitment, notice, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court . . . ; provided that nothing in this section shall prevent public inspection of any complaints or indictments in a criminal case, or prevent any notation in the ordinary docket of criminal cases concerning commitment proceedings under sections one to eighteen against a defendant in a criminal case. Notwithstanding the provisions of this paragraph, any person who is the subject of an examination or a commitment proceeding, or his counsel, may inspect all reports and papers filed with the court in a pending proceeding, and the prosecutor in a criminal case may inspect all reports and papers concerning commitment proceedings that are filed with the court in a pending case." G.L. c. 123, § 36A.

⁴⁸ See n.47, *supra*.

⁴⁹ These include business records produced pursuant to G.L. c. 233, § 79J, hospital records produced pursuant to G.L. c. 233, § 79, and records produced pursuant to the protocol of *Commonwealth v. Dwyer*, 448 Mass. 122, 148-149, 859 N.E.2d 400, 421 (2006).

⁵⁰ Such statements are authorized by G.L. c. 279, § 4B in felony and vehicular homicide cases. The statute does not address the issue of public access, but such statements appear conceptually to be part of the presentence report, which is not publicly accessible. Mass. R. Crim. P. 28(d)(3). See also G.L. c. 276, § 100 (probation records "shall not be regarded as public records and shall not be open for public inspection").

⁵¹ See "Affidavit of Indigency and Request for Waiver, Substitution or State Payment of Fees and Costs" form (reproduced at 803-805 Mass. Dec. XXIX (effective May 5, 2003) (providing that "By order of the Supreme Judicial Court, all information in this affidavit is CONFIDENTIAL. Except by special order of a court, it shall not be disclosed to anyone other than authorized court personnel, the applicant, applicant's counsel or anyone authorized in writing by the applicant").

"[B]y order of the Supreme Judicial Court, as required by c. 261, § 27B, the financial information contained in an affidavit of indigency, pursuant to both G.L. c. 261, § 29 (inmate), and G.L. c. 261, § 27B (non-inmate), may not, except by order of the recipient court, be disclosed to anyone other than authorized court personnel, the applicant, the applicant's counsel or anyone authorized in writing by the applicant." *Kordis v. Superintendent, Souza Baranowski Correctional Ctr.*, 58 Mass. App. Ct. 902, 904, 787 N.E.2d 613, 615 (2003).

"[A]ll information contained in the forms is to remain confidential. In order to clarify the confidentiality requirement, I am repeating the comments of Chief Justice Tauro which accompanied his publication of the affidavit of indigency form in February of 1974: 'The confidentiality provision was inserted to protect the privacy of applicants who must reveal financial and other information of a highly personal nature. The provision permits disclosure only to authorized court personnel and to parties to the litigation (See G.L. c. 261, § 27B as inserted by St. 1974, c. 694, § 3.) In order to comply with this provision, it would be sufficient to separate the form itself from other public records in the case. The manner of accomplishing this separation is, of course, a matter of internal administration for the various clerks and registers. I would suggest, however, that either the form could be impounded or it might be color-coded for easy removal from other case papers. There is no intention to require that any hearing on fees and costs be closed or that docket entries or court orders be kept confidential.'" Statement of S.J.C. Chief Justice Edward F. Hennessey, "Re: New Affidavit of Indigency Forms – G.L. c. 261, § 27B" (March 2, 1981) (reproduced at 414-416 Mass. Decisions xxxiii).

See also *In re Boston Herald*, 321 F.3d 174 (1st Cir. 2003) (no First Amendment or common law right of public access to a criminal defendant's financial statement filed with a Federal court in applying for appointed defense counsel).

- *Juror questionnaires.* Jurors' confidential questionnaires or criminal records.⁵²
- *Old sealed cases.* Old cases sealed by the Commissioner of Probation⁵³
EXCEPT that a jury session judge's required statement of reasons for not imposing a committed sentence for an offense under G.L. c. 265 remains publicly available.⁵⁴
- *Cases sealed because of a "no bill."* Cases automatically sealed because of a grand jury "no bill".⁵⁵
- *Cases sealed because of a pardon.* Cases for which the defendant has received a gubernatorial pardon, and which the Governor has directed be sealed⁵⁶
EXCEPT that a jury session judge's required statement of reasons for not imposing a committed sentence for an offense under G.L. c. 265 remains publicly available.⁵⁷
- *Sealed cases that conform to Pokaski.* The following cases *if* ordered sealed by a judge *and if* they include judicial findings of fact that there is a compelling governmental interest supporting sealing that outweighs the public's presumptive right of access:
 - "not guilty" or "no probable cause" cases (G.L. c. 276, § 100C)
 - dismissed or nolle prossed cases (G.L. c. 276, § 100C)
 - dismissed 1st offense marihuana possession cases (G.L. c. 94C, § 34)
 - dismissed 1st offense controlled substance possession cases (c. 94C, § 34 or St. 1983, c. 1102, § 1)
 - dismissed, "not guilty" or nolle prossed controlled substance possession cases (G.L. c. 94C, § 44)⁵⁸
EXCEPT that a jury session judge's required statement of reasons for not imposing a committed sentence for an offense under G.L. c. 265 remains publicly available.⁵⁹

⁵² "These completed questionnaires [of potential jurors] shall not constitute a public record. All copies of juror questionnaire[s], other than the copy retained by the trial judge and the original retained by the clerk, shall be destroyed as soon as practicable after the completion of voir dire." G.L. c. 234A, § 23. "The court, the office of jury commissioner, and the clerk . . . shall have authority to inquire into the criminal history records of grand and trial jurors for the limited purpose of corroborating and determining their qualifications for juror service All criminal offender record information obtained under this section shall be held confidential by persons authorized hereunder." G.L. c. 234A, § 33.

⁵³ G.L. c. 276, § 100A. See p.42 for a chart summarizing § 100A.

⁵⁴ "In sentencing a person for any provision of this chapter, the penalty for which includes imprisonment, a judge sitting . . . in a jury of six session who does not impose such sentence of imprisonment shall include in the record of the case specific reasons for not imposing a sentence of imprisonment. Notwithstanding any general or special law to the contrary, the record of such reasons shall be a public record." G.L. c. 265, § 40 (applicable to offenses committed on or after October 20, 1989).

⁵⁵ G.L. c. 276, § 100C, first par. See generally *Matter of Doe Grand Jury Investigation*, 415 Mass. 727, 615 N.E.2d 567 (1993). *Pokaski*, 868 F.2d at 509-510, ruled that this provision of § 100C does not offend the First Amendment.

⁵⁶ G.L. c. 127, § 152, fifth par.

⁵⁷ See n.54, *supra*.

⁵⁸ See pp. 42-43 for a chart of statutory sealing provisions and a summary of the requirements of *Globe Newspaper v. Pokaski*, 868 F.2d 497 (1st Cir. 1989). See n.41, *supra*, as to cases sealed pre-*Pokaski*.

⁵⁹ See n.54, *supra*.

3. Applications for Criminal Complaints

PUBLICLY AVAILABLE:

- *Allowed applications:* alphabetical indexes, dockets, contents of case files, exhibits put in evidence, and tape recordings (if any) of proceedings, are to be filed with the criminal case papers and are publicly available, with exceptions below.⁶⁰

PRESUMPTIVELY NOT PUBLICLY AVAILABLE:

- *Pending or denied applications:* alphabetical indexes, dockets, contents of case files, exhibits put in evidence, and tape recordings (if any) of proceedings should presumptively be closed to the public unless the clerk-magistrate or a judge concludes that the legitimate interest of the public outweighs the privacy interests of the accused.⁶¹

⁶⁰ District Court Standards of Judicial Practice, *The Complaint Procedure* § 3:25 (1975), provides as follows:

“3:25 Record Keeping. Applications for issuance of process, regardless of the action taken upon them, should be retained for one year from the date they are received by the court. When denied or while action is being deferred such applications should be filed in chronological order by name of the accused. When granted, they should be placed with the case papers.”

⁶¹ District Court Standards of Judicial Practice, *The Complaint Procedure* §§ 3:15 and 3:16 (1975), provide as follows:

“3:15 Character of Hearings. Presumptively, hearings ought to be private and as informal as circumstances will permit. Private hearings should not be held in a courtroom.

“Persons who cannot contribute materially to the proper hearing or disposition of the application should be excluded from a private hearing.

Commentary

“The open and public character of most court proceedings is well known. It is an essential part of the criminal and civil justice process. The law does not require, however, that hearings for applications for issuance of process be held in public. Indeed, the legal considerations which dictate the public character of a trial are simply not present here. As in the analogous investigatory proceedings of a grand jury, privacy is desirable. The proposition that a majority of crimes relate to fact situations resulting in personal embarrassment to the victim and to the accused against whom probable cause may not be found should be sufficient to govern the private-public issue. Citizens should be spared personal embarrassment whenever possible

“3:16 Public Hearings. If the application is one of special public significance, and if in the opinion of the magistrate the legitimate interest of the public outweighs the right of privacy in the accused, the hearing may be open to the public, and should be conducted in the formal atmosphere of a courtroom.

Commentary

“The standard governing the conduct of a hearing in which there is such a public interest as to require that the hearing be public should result in this practice being very much the exception rather than the rule. While neither justice nor the appearance of justice should be allowed to suffer by a disposition of public matters in a closed door setting, at the same time it should be recognized that ordinarily an accused is entitled to privacy at this early stage of the proceedings. For a discussion of this principle in connection with felony cases, see *Commonwealth v. Harris*, 231 Mass. 584, 121 N.E. 409 (1919). In the last analysis only the magistrate who conducts the hearing can balance the public and private interests involved. The sole fact that the person complained against is a public official or otherwise well known is not in and of itself, however, reason for the hearing to be public”

There is no First Amendment right of access to show cause hearings that precede the initiation of criminal proceedings. *Eagle-Tribune Pub. Co. v. Clerk-Magistrate of Lawrence Div. of Dist. Court Dep’t*, 448 Mass. 647, 863 N.E.2d 517 (2007).

NOT PUBLICLY AVAILABLE:

- *Sexual offense victim's name.*⁶²
- *Photographs of unsuspecting nude person.*⁶³

“Where an incident has already attracted public attention prior to a show cause hearing, the interest in shielding the participants from publicity is necessarily diminished, while the public’s legitimate interest in access is correspondingly stronger.

“In deciding whether to allow access to a particular show cause hearing, clerk-magistrates should consider not only the potential drawbacks of public access, but its considerable benefits The transparency that open proceedings afford may be especially important if a well-publicized show cause hearing results in a decision not to bring criminal charges, thereby ending the matter. In such cases, the public may question whether justice has been done behind the closed doors of the hearing room. This is not to say that every case that may attract public attention necessarily requires a public show cause hearing; for instance, ‘[t]he sole fact that the person complained against is a public official or otherwise well known is not in and of itself . . . reason for the hearing to be public.’ Commentary to standard 3:16 of the Complaint Standards. Of course, relief from a clerk-magistrate’s decision in extraordinary cases may be sought from a single justice of this court

“In all cases in which a request for an open hearing is made, we encourage clerk-magistrates to make a written record of the reasons for their decision, as was done here.”

Id., 448 Mass. at. 656-657 & n.17, 863 N.E.2d at 526-527 & n.17.

This policy rests on the similarity of a clerk’s or judge’s hearing under G.L. c. 218, §§ 35 or 35A to grand jury proceedings, whose traditional secrecy is “deeply rooted in the common law of the Commonwealth [and] designed to protect individuals from notoriety and disgrace unless probable cause is found” *WBZ-TV4 v. District Attorney for the Suffolk Dist.*, 408 Mass. 595, 599-600, 562 N.E.2d 817, 820 (1990). See *Jones v. Robbins*, 8 Gray 329, 344 (1857) (Shaw, C.J.) (“The right of individual citizens to be secure from an open and public accusation of crime . . . before a probable cause is established . . . is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty”). The accused has no libel protection against the complainant’s accusations in a criminal complaint application, no matter how frivolous. *Sibley v. Holyoke Transcript-Telegram Pub. Co.*, 391 Mass. 468, 461 N.E.2d 823 (1984); *Thompson v. Globe Newspaper Co.*, 279 Mass. 176, 186-187, 181 N.E. 249, 253 (1932). See also G.L. c. 218, § 31 (denied applications to be filed separately and destroyed one year after filing).

⁶² See *supra* at 13 n.44.

⁶³ See *supra* at 13 n.45.

4. Civil Cases

including civil tort and contract cases, civil motor vehicle infractions, other civil infractions, small claims, supplementary process, summary process, replevin, and administrative appeals

PUBLICLY AVAILABLE:

- *Indexes, dockets, case files.* Alphabetical indexes, docket books, and contents of case files,⁶⁴ with exceptions below.
- *Exhibits* put in evidence that are in the clerk's custody,⁶⁵ with exceptions below.
- *Copies of the audio recording* of proceedings,⁶⁶ with exceptions below.

NOT PUBLICLY AVAILABLE:

- *Specific impoundments.* Cases, information or materials specifically impounded by a judge.⁶⁷
- *Address Confidentiality Program affidavits.* Affidavits giving the actual address of litigants who wish to employ in civil litigation the post office box address that has been assigned to them by the Secretary of State's Address Confidentiality Program.⁶⁸

⁶⁴ Trial Court Administrative Directive No. 1-84, "Public Access to Court Records" (March 21, 1984). *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17, 100 S.Ct. 2814, 2829 n.17 (1980) ("[H]istorically both civil and criminal trials have been presumptively open"); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787-790 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989) (civil rules 5[c] and 26[c] together imply a public right of access to civil discovery materials filed in court unless there is good cause for a protective order); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408 n.4 & 409 (presumption of public access applies to civil as well as criminal proceedings).

The printed alphabetical "Party Index" produced by the District Court's civil case management system, BasCOT Civil, does not include sealed or impounded cases.

⁶⁵ See n.38, *supra*.

⁶⁶ See n.10, *supra*.

⁶⁷ See pp. 6-8. Most impoundments in civil cases are governed by Trial Court Rule VIII, Uniform Rules on Impoundment Procedure (reproduced as Appendix B). Protective orders under Dist./Mun. Cts. R. Civ. P. 26(c) are another form of "impoundment."

⁶⁸ S.J.C. Rule 1:20 ("Any address confidentiality program participant and minor child(ren) residing with the program participant . . . shall be entitled to use the address designated for him or her by the Secretary of the Commonwealth pursuant to Chapter 9A of the General Laws as his or her address. This address may be used in connection with any civil proceeding that is open to the public, except youthful offender cases, and except as may be ordered by the court, provided that the program participant first submits to the court in which the particular action is pending or is to be filed, an affidavit for use of substitute address on a form provided in this rule. The actual address of the program participant may be used by court personnel in the furtherance of their official duties, but such address shall not be used for purposes of mailing any documents, notices or orders Said affidavit shall be impounded by operation of this rule without any further judicial action. The Clerk . . . shall segregate the impounded affidavit from the other papers and shall not make the information contained therein available to other parties"). See generally G.L. c. 9A; 950 Code Mass. Regs. § 130.

- *Fee waiver applications by indigents.* Applications for waiver of fees or costs for indigents (G.L. c. 261, §§ 27A-29).⁶⁹
- *Financial statements of judgment debtors in small claims.*⁷⁰
- *Records deposited with the clerk-magistrate as potential exhibits but not yet introduced in evidence.*⁷¹

⁶⁹ See n.51, *supra*.

⁷⁰ “The Notice of Judgment and Order form shall advise the parties that, unless the defendant timely appeals from the judgment, the defendant is required to complete a written financial statement under the penalties of perjury, to provide the plaintiff with a copy of the statement prior to the hearing, and to appear in court on that date if payment has not been made as ordered. The Notice shall further state that any such financial statement shall be kept separate from other papers in the case and shall not be available for public inspection, but shall be available to the court, to attorneys whose appearances are entered in the case and to the parties to the case.” Trial Court Rule III, Uniform Small Claims Rule 7(g) (as amended January 1, 2002).

⁷¹ See n.49, *supra*.

5. Abuse Prevention Proceedings

under General Laws c. 209A

PUBLICLY AVAILABLE:

- Alphabetical indexes, docket books, contents of case files, exhibits put in evidence that are in the clerk's custody, and copies of the audio recording of proceedings, with exceptions below.⁷²

NOT PUBLICLY AVAILABLE:

- *Where either party is a minor*, the entire record is not publicly available except on a judge's order.⁷³
- The following information is not publicly available except on a judge's order:
 - Plaintiff's residential address and telephone number
 - Plaintiff's workplace name, address and telephone number.⁷⁴

⁷² The Supreme Judicial Court has "glean[ed] from [the 1999 amendments to G.L. c. 209A] the Legislature's determination that, except as expressly provided, judicial records of G.L. c. 209A proceedings are presumptively open." *Boston Herald, Inc. v. Sharpe*, 432 Mass. 593, 607-608, 737 N.E.2d 859, 870 (2000). Trial Court Administrative Directive No. 1-89 (November 13, 1989) imposed a requirement that even persons inspecting publicly accessible portions of the records of G.L. c. 209A were required to identify themselves in writing. That Administrative Directive appears to be dormant, though never formally repealed.

⁷³ G.L. c. 209A, § 8, first par. (Records of cases "where the plaintiff or defendant is a minor shall be withheld from public inspection except by order of the court; provided, that such records shall be open, at all reasonable times, to the inspection of the minor, said minor's parent, guardian, attorney, and to the plaintiff and the plaintiff's attorney, or any of them"). Trial Court Rule VIII, the Uniform Rules on Impoundment Procedure (reproduced as Appendix B), governs motions for the release of such materials.

⁷⁴ Such information "shall be confidential and withheld from public inspection, except by order of the court, except that the plaintiff's residential address and workplace address shall appear on the court order and [be] accessible to the defendant and the defendant's attorney unless the plaintiff specifically requests that this information be withheld from the order The provisions of this paragraph shall apply to any protection order issued by another jurisdiction, as defined in [G.L. c.209A, § 1], that is filed with a court of the commonwealth pursuant to [G.L. c. 209A, § 5A]. Such confidential portions of the court records shall not be deemed to be public records under the provisions of [G.L. c. 4, § 7, cl. twenty-sixth]." G.L. c. 209A, § 8, second par.

Note that the statute provides that, even if the plaintiff's residential and workplace addresses appear on the court order (and are therefore accessible to the defendant), they remain inaccessible to the public.

Normally all such confidential information is excluded from the plaintiff's complaint and instead filed with the court on a "Confidential Information Form." It must also be redacted from any court document or any cassette or CD copy before it is made accessible to the public:

"Clerk-Magistrates . . . and their staffs should attempt to segregate confidential information in public case records. They shall remove all confidential information from all cases and case management records before providing access to these case records The office of the Clerk-Magistrate shall take appropriate steps to ensure that unauthorized persons do not obtain [such] confidential information" Memorandum from Trial Court Chief Justice for Administration and Management Barbara A. Dortch-Okara, "Amendments to the Confidentiality Provisions of c. 209A" at 2 (Trans. 760, November 10, 2000).

"*Safeguarding . . . addresses when cassette copies are requested*" "When a person orders a cassette copy of proceedings in a G.L. c. 209A case . . . the clerk-magistrate must . . . take appropriate steps to prevent inadvertent release of the plaintiff's . . . address in case it was mentioned on the recording. It appears to me that the only sure way to do this (though admittedly time consuming) is to have a staff member listen to the original tape of proceedings to confirm that the . . . address is not mentioned, and clerk-magistrates should follow that practice [S]uch review at the local court is essential to protecting any confidential addresses that appear on such tapes." District Court Memorandum, "Three Domestic Violence Issues" (Trans. 519, October 6, 1994).

By statute, such information is available to certain specified persons.⁷⁵ They must request such access in writing and provide photo identification.⁷⁶

- *Address Confidentiality Program affidavits.* Affidavits giving the actual address of litigants who wish to employ in civil litigation the post office box address that has been assigned to them by the Secretary of State's Address Confidentiality Program.⁷⁷
- *Specific impoundments.* Cases, information or materials specifically impounded by a judge pursuant to the Uniform Rules on Impoundment Procedure.⁷⁸

⁷⁵ "All confidential portions of the records shall be accessible at all reasonable times to the plaintiff and plaintiff's attorney, to others specifically authorized by the plaintiff to obtain such information, and to prosecutors, victim-witness advocates as defined in [G.L. c. 258B, § 1], domestic violence victim's counselors as defined in [G.L. c. 233, § 20K], sexual assault counselors as defined in [G.L. c. 233, § 20J], and law enforcement officers, if such access is necessary in the performance of their duties." G.L. c. 209A, § 8, second par.

⁷⁶ "Any and all requests to obtain access to the confidential information, including requests made by persons authorized by the plaintiff and by those individuals authorized by statute for whom access to the information is necessary in the performance of their duties, shall be submitted to the office of the appropriate Clerk-Magistrate . . . on the enclosed Request for Access to Confidential Information Form which shall be signed by the person requesting the confidential information. Persons seeking access to such information shall also present to the office of the Clerk-Magistrate . . . a valid driver's license or other suitable photographic verification of the person's identity and signature and as required by statute, set forth the reason(s) access to the information is necessary in the performance of their duties." Memorandum from Trial Court Chief Justice for Administration and Management Barbara A. Dortch-Okara, "Amendments to the Confidentiality Provisions of c. 209A" at 2 (Trans. 760, November 10, 2000).

⁷⁷ See n.68, *supra*.

⁷⁸ "Chapter 209A no longer provides for the impoundment of the plaintiff's address upon request Any information in the court record which the plaintiff wishes to be impounded may now be impounded only in accordance with" Trial Court Rule VIII, the Uniform Rules on Impoundment Procedure (reproduced as Appendix B). Memorandum from Trial Court Chief Justice for Administration and Management Barbara A. Dortch-Okara, "Amendments to the Confidentiality Provisions of c. 209A" at 1 (Trans. 760, November 10, 2000).

Requests for access to such specifically-impounded materials are also governed by the Uniform Rules on Impoundment Procedure. "The process of securing confidential information and providing appropriate access thereto is separate and distinct from the impoundment process. Requests for access to impounded information shall be reviewed by the court." *Id.* at 2.

6. Mental Health Cases

NOT PUBLICLY AVAILABLE:

- *Mental health examinations and commitments.* Alphabetical indexes, docket books, case files, exhibits put in evidence that are in the clerk's custody, copies of the audio recording of proceedings,⁷⁹ and all reports of mental health examinations and commitments (G.L. c. 123, §§ 1-18), including reports filed in other types of cases (e.g. criminal cases), except on a judge's order⁸⁰.
- *Alcohol or drug abuse examinations and commitments.* Alphabetical indexes, docket books, case files, exhibits put in evidence that are in the clerk's custody, copies of the audio recording of proceedings, and all reports of alcohol or drug abuse examinations and commitments (G.L. c. 123, § 35), except on a judge's order.⁸¹
- *Fee waiver applications by indigents.* Applications for waiver of fees or costs for indigents (G.L. c. 261, §§ 27A-29).⁸²

⁷⁹ Access by the parties to cassette copies of closed proceedings is governed by District Court Special Rule 211(A)(5). See n.10, *supra*.

It is unclear whether reports of drug dependency examinations and rehabilitation (G.L. c. 111E, §§ 10-12) are publicly available. Drug program records are confidential except on judicial order (§ 18), but there is no equivalent statutory provision for related court records.

⁸⁰ G.L. c. 123, § 36A ("All reports of examinations made to a court pursuant to sections one to eighteen, inclusive . . . shall be private except in the discretion of the court. All petitions for commitment, notice, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court Notwithstanding the provisions of this paragraph, any person who is the subject of an examination or a commitment proceeding, or his counsel, may inspect all reports and papers filed with the court in a pending proceeding, and the prosecutor in a criminal case may inspect all reports and papers concerning commitment proceedings that are filed with the court in a pending case").

⁸¹ See n.80, *supra*.

⁸² See n.51, *supra*.

7. Search Warrants

PUBLICLY AVAILABLE:

- *After return of the warrant*, the search warrant, the application, the return of service, and any supporting affidavits are publicly available unless they have been impounded by a judge.⁸³ The application or affidavits may have to be expurgated if they include the name of the victim of certain sexual offenses.⁸⁴

NOT PUBLICLY AVAILABLE:

- *Between issuance and return*, a search warrant, the application for search warrant and any supporting affidavits are not publicly available.⁸⁵

8. Inquests

NOT PUBLICLY AVAILABLE.⁸⁶

⁸³ *Newspapers of New England, Inc.*, 403 Mass. at 631, 531 N.E.2d at 1263 (“On its face [G.L. c. 276, § 2B] provides, in effect, that, once the warrant and affidavit have been returned to the court, they become public documents On filing with the court the affidavit is a public document both under the statute and the common law”).

⁸⁴ See text at n.44, *supra*.

⁸⁵ G.L. c. 276, § 2B (“Upon the return of said warrant, the affidavit shall be attached to it and shall be filed therewith, and it shall not be a public document until the warrant is returned”).

⁸⁶ The District Court judge’s report and transcript filed in the Superior Court is available only to the Attorney General or to the appropriate District Attorney, to “[a]ny person who has been identified by the attorney general or the district attorney, as the case may be, as the target of an investigation in connection with the death of the deceased” or his or her counsel. Upon order of a Superior Court judge, they become publicly available: (1) if the prosecutor files a no-prosecution certificate, or (2) if the grand jury returns a “no bill,” or (3) once the trial of those named as responsible is completed, or (4) if the Superior Court judge determines that no prosecution is likely. G.L. c. 38, §§ 8, 10. *Kennedy v. Justice of the Dist. Court of Dukes County*, 356 Mass. 367, 377-378, 252 N.E.2d 201, 207 (1969). “Following [such a] Superior Court order . . . , any other inquest documents in the possession of the District Court, including audio copies of the electronic recording of the proceedings, may be opened to public access in the discretion of the inquest judge, or a judge of the District Court where the inquest was held if the inquest judge is not reasonably available. But such discretion should be governed by the procedures governing impoundment, Trial Court Rule VIII, and by applicable constitutional requirements governing public access to court records.” District Court Standards of Judicial Practice, *Inquest Proceedings* § 4:04 (1990).

9. Juvenile & Youthful Offender Cases

PUBLICLY AVAILABLE:

- *Murder cases.* Alphabetical indexes, docket books, contents of case files, exhibits put in evidence that are in the clerk's custody, and cassette copies of proceedings in a murder case allegedly committed on or after July 27, 1996 by a juvenile who was then 14-16 years old,⁸⁷ unless specifically impounded by a judge.
- *Youthful Offender cases.* Alphabetical indexes, docket books, contents of case files, exhibits put in evidence that are in the clerk's custody, and cassette or CD copies of Youthful Offender proceedings under G.L. c. 119, § 54,⁸⁸ unless specifically impounded by a judge.
- *Names of recidivists.* The probation officer shall make public solely the *name* of an accused delinquent if:
 - the juvenile was at least 14 at time of offense, *and*
 - the offense would be a felony if committed by an adult, *and*
 - the juvenile was previously found delinquent on at least two occasions for acts that would be felonies if committed by an adult.⁸⁹
- *DYS-commitment extensions.* Alphabetical indexes, docket books, contents of case files, exhibits put in evidence, and cassette copies, of proceedings under G.L. c. 120, §§ 17-19 to extend DYS control of a person beyond the original discharge date, unless specifically impounded by a judge.⁹⁰

⁸⁷ G.L. c. 119, § 74, second par. (effective July 27, 1996) ("The juvenile court shall not have jurisdiction over a person who had at the time of the offense attained the age of fourteen but not yet attained the age of seventeen who is charged with committing murder in the first or second degree. Complaints and indictments brought against persons for such offenses . . . shall be brought in accordance with the usual course and manner of criminal proceedings.").

⁸⁸ G.L. c. 119, § 60A, first par. ("The records of a youthful offender proceeding conducted pursuant to an indictment shall be open to public inspection in the same manner and to the same extent as adult criminal court records"). Arraignments as a youthful offender are open to the public even though the prior delinquency case is still pending at that time. *Commonwealth v. Christopher Carlton*, No. SJ-2000-0145 (Sup. Jud. Ct. for Suffolk Cty.) (Lynch, J.)

⁸⁹ G.L. c. 119, § 60A, second par.

⁹⁰ *New England Television Corp. v. Department of Youth Servs.*, No. 89-205 (Sup. Jud. Ct. for Suffolk Cty. May 4, 1989) (Wilkins, J., single justice) ("Unless a statute (or perhaps court rule) states otherwise, no blanket closing of particular kinds of proceedings should be accepted. Therefore, a person, once found delinquent as a juvenile, who is now twenty years old does not have the benefit of closed proceedings Whether the particular circumstances of this proceeding warrant closing it to the public [is to be] considered in the district court. If, for example, the prospects for treatment of the former juvenile would be adversely affected by a public hearing on the extension commitment order, the judge on proper findings of fact could be warranted in closing the proceedings."). See also *Department of Youth Servs. v. A Juvenile*, 384 Mass. 784, 790-791, 429 N.E.2d 709, 713 (1981) ("[W]e believe that the Legislature intended that extended commitment be treated as a matter for independent determination rather than an extension of prior juvenile proceedings.")

NOT PUBLICLY AVAILABLE:

- *Juvenile delinquency* alphabetical indexes, dockets, contents of case files, exhibits put in evidence that are in the clerk's custody, and cassette copies of proceedings, except on a judge's order.⁹¹
- *Care and protection* alphabetical indexes, dockets, contents of case files, exhibits put in evidence that are in the clerk's custody, and cassette copies of proceedings.⁹²
- *CHINS* (Child in Need of Supervision) alphabetical indexes, dockets, contents of case files, exhibits put in evidence that are in the clerk's custody, and cassette copies of proceedings.⁹³

⁹¹ G.L. c. 119, § 60A, first par. (except for youthful offender proceedings, "[a]ll other records of the court in cases of delinquency arising under [G.L. c. 119, §§ 52-59] inclusive, shall be withheld from public inspection except with the consent of a justice of such court; provided, however, that such records shall be open, at all reasonable times, to the inspection of the child proceeded against, his parents, guardian or attorney"); G.L. c. 119, § 65 (in all juvenile sessions "the court shall exclude the general public from juvenile sessions admitting only such persons as may have a direct interest in the case."). District Court Special Rule 211(A)(5) ("Counsel for any party, or any party who has entered an appearance pro se, shall be permitted to obtain a cassette copy of [any proceeding which was not open to the public] upon certifying that such cassette copy will be used solely for an appeal, or to determine whether to claim an appeal, in the same manner. Unless the judge who presided over the proceeding has ordered otherwise, the clerk-magistrate shall provide such cassette copy upon such certification without requiring a judge's approval of the request. A cassette copy of [any proceeding which was not open to the public] may be made available to other persons or for other purposes only with the approval of the judge who presided over the proceeding or, if that judge is unavailable for an extended period . . . , any judge of the court.").

⁹² G.L. c. 119, § 38 ("All hearings under sections one to thirty-seven, inclusive, shall be closed to the general public and it shall be unlawful to publish the names of persons before the court in any hearing provided for therein, except under section twenty-one"); G.L. c. 119, § 65 (see n.91, *supra*). District Court Special Rule 211(A)(5) (see n.91, *supra*); District Court Special Rule 212(e) ("*Access to Records*. In order to facilitate the trial and appeal of such matters, an attorney of record for any party may inspect and obtain a copy of any portion of the court record of the case (including the investigator's report), except for any portions of the court record which the judge has ordered impounded or otherwise restricted. In order to protect the privacy of the child and the parents, (1) the child's parents themselves and any other persons requesting access to the record of the case shall be granted such access only pursuant to an order by the court; (2) an attorney for a party may permit his or her client to view the attorney's copy, but shall not duplicate or distribute the copy to the client or to any other person, except upon court order; and (3) any other person (including a party) whom the court permits to receive a copy of any portion of the court record shall not further duplicate or distribute it, except upon court order.").

⁹³ G.L. c. 119, § 39I (CHINS appeals "shall be heard in a session set apart from the other business of the district court and devoted exclusively to juvenile cases . . . [with] a separate trial list and docket"); G.L. c. 119, § 65 (see n.91, *supra*). District Court Special Rule 211(A)(5) (see n.91, *supra*).

10. Civil Paternity Cases

including civil child support proceedings under G.L. c. 209C, and proceedings under G.L. c. 209D (the Uniform Interstate Family Support Act) that involve the issue of paternity

PUBLICLY AVAILABLE:

- Alphabetical indexes, docket books, contents of case files, exhibits put in evidence that are in the clerk's custody, and copies of the audio recording of proceedings, with exceptions below.

NOT PUBLICLY AVAILABLE:

- *Findings of non-paternity.* Cases in which the defendant has been adjudicated *not* to be the father.
- *Specific impoundments.* Cases, information or materials specifically impounded by a judge "for good cause shown."
- *Impounded address.* The plaintiff's address, if impounded by a judge.⁹⁴

⁹⁴ G.L. c. 209C, § 13 ("In an action to establish paternity or in which paternity of a child is an issue, all complaints, pleadings, papers, documents, or reports filed in connection therewith, docket entries in the permanent docket and record books shall be segregated and unavailable for inspection only if the judge of the court where such records are kept, for good cause shown, so orders or the person alleged to be the father is adjudicated not to be the father of the child For good cause shown, which may be made ex parte or upon credible evidence, parties may file a complaint without the address, and the court shall impound a party's address by excluding it from the complaint and from all other court documents and testimony, and shall ensure that the address is kept confidential from each other party except the IV-D agency as set forth in chapter 119A."). The statute allows access to such records (except for the plaintiff's address, if impounded) to the parties and certain state child welfare agencies.

11. Probation Records

PUBLICLY AVAILABLE:

- A judge may permit the probation department to release a summary of why a criminal defendant has been released or denied release.⁹⁵

NOT PUBLICLY AVAILABLE:

- *Probation records.* By statute, probation records are not publicly accessible.⁹⁶
- *Presentence reports.* Since presentence reports are compiled by probation officers and maintained as part of a defendant's probation file, it appears that they are not publicly accessible.⁹⁷ This would include any written victim impact statement.⁹⁸

⁹⁵ “[A] probation department with the approval of a justice [of] the appropriate division of the trial court, may, in its discretion, make available a summary, which may include references to evaluative information, concerning a decision to release an individual on a permanent or temporary basis, to deny such release or to change his custody status.” G.L. c. 6, § 171, sixth par. 803 Code Mass. Regs. § 2.04(5)(c)(3)(b) is to the same effect. “Evaluative information” is defined as “Records, data, or reports concerning individuals charged with crime and compiled by criminal justice agencies which appraise mental condition, physical condition, extent of social adjustment, rehabilitative progress, and the like, and which are primarily used in connection with bail, pre-trial or post-trial release proceedings, sentencing, correctional and rehabilitative planning, probation or parole.” G.L. c. 6, § 167, third par. 803 Code Mass. Regs. § 2.03 is to the same effect.

⁹⁶ “[I]nformation concerning persons on probation . . . shall not be regarded as public records and shall not be open for public inspection but shall be accessible to the justices and probation officers of the courts, to the police commissioner for the city of Boston, to all chiefs of police and city marshals, and to such departments of the state and local governments as the commissioner [of probation] may determine.” G.L. c. 276, § 100. Public access to compiled criminal records is available under G.L. c. 6, § 167-178B through the Criminal History Systems Board (see Appendix A).

⁹⁷ “**Availability to Parties.** Prior to the disposition the presentence report shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.” Mass. R. Crim. P. 28(d)(3).

⁹⁸ “Before disposition in any case where a defendant has been found guilty of any felony or any crime against the person or crime where physical injury to a person results, excluding any crime for which a sentence of death may be imposed, and which involves an identified victim whose whereabouts are known, the district attorney shall give the victim actual notice . . . of the victim's right to make a statement to the court, orally or in writing at the victim's option, as to the impact of the crime and as to a recommended sentence Before disposition, the district attorney shall file any such written statement with the court and shall make it available to the defendant

“Before said disposition the office of the district attorney shall cause to be prepared a written statement as to the impact of the crime on the victim, which shall be filed with the court as part of the presentence report and made available to the defendant” G.L. c. 279, § 4B.

12. Court Administrative Records

Like case records, court administrative records are not covered by the Commonwealth's general public records statutes.⁹⁹ Requests for public access to such records are considered on a case-by-case basis. When a clerk-magistrate receives a specific request for public access to court administrative records, he or she should ask that it be reduced to writing, and then should seek guidance from legal counsel in the District Court or Trial Court administrative offices.

Generally, court administrative records will not be made available to the public if they fit one of the specific exceptions to public access found in the Commonwealth's general public records statutes.¹⁰⁰

Among the more common of these exceptions are:

- *Statutory impoundments.* Records “specifically or by necessary implication exempted from disclosure by statute.”¹⁰¹
- *Personnel matters.* Records “related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding.”¹⁰²
- *Employee privacy.* “[P]ersonnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy.”¹⁰³ This exception prevents public release of all personnel and medical files,¹⁰⁴ but not public release of employee names and job classifications,¹⁰⁵ salaries,¹⁰⁶ and time and attendance calendars.¹⁰⁷

⁹⁹ See n.2, *supra*. See also *Kraytsberg v. Kraytsberg*, 441 Mass. 1020, 808 N.E.2d 1243 (2004) (Appeals Court's internal memoranda not public records); *Petition of Union Leader Corp.*, 147 N.H. 603, 809 A.2d 752 (2002) (agendas and minutes of judges' meetings not public records; “We find no case from this or any jurisdiction . . . establishing that materials unrelated to the adjudicatory function of the courts have historically been open to public inspection or considered to be court records for purposes of public access”).

¹⁰⁰ See generally *A Guide to the Massachusetts Public Records Law* at www.sec.state.ma.us/pre/prepdf/guide.pdf.

¹⁰¹ G.L. c. 4, § 7, Twenty-sixth, exception (a).

¹⁰² *Id.* at exception (b).

¹⁰³ *Id.* at exception (c).

¹⁰⁴ *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 446 N.E.2d 101 (1983).

¹⁰⁵ *Pottle v. School Comm. of Braintree*, 395 Mass. 861, 482 N.E.2d 813 (1985).

¹⁰⁶ *Hastings & Sons Publishing Co. v. City Treasurer of Lynn*, 374 Mass. 812, 374 N.E.2d 299 (1978).

¹⁰⁷ *Brogan v. School Comm. of Westport*, 401 Mass. 306, 516 N.E.2d 159 (1987).

- *Home addresses.* Home addresses and telephone numbers of judges, court employees, prosecutors, public safety personnel and crime victims, and their families.¹⁰⁸
- *Internal policy memoranda.* “[M]emoranda or letters relating to policy positions being developed by the agency.”¹⁰⁹
- *Personal notes.* “[N]otebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit.”¹¹⁰
- *Investigatory materials.* “[I]nvestigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest.”¹¹¹
- *Bids.* “[P]roposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person.”¹¹²

Note that these statutory exceptions are applied only analogously to judicial branch records.¹¹³ The absence of a directly-relevant statutory exception is not finally determinative as to whether a particular court administrative record should be made available to the public.

¹⁰⁸ “The home address and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, correctional and any other public safety and criminal justice system personnel shall not be public records in the custody of the employers of such personnel and shall not be disclosed; provided, however, that such information may be disclosed to an employee organization under [G.L. c. 150E] or to a criminal justice agency as defined in [G.L. c. 6, § 167]. The name and home address and telephone number of a family member of any such personnel shall not be public records in the custody of the employers of the foregoing persons and shall not be disclosed. The home address and telephone number, or place of employment or education of victims of adjudicated crimes and of persons providing or training in family planning services and the name and home address and telephone number, or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.” G.L. c. 66, § 10, sixth par.

¹⁰⁹ G.L. c. 4, § 7, Twenty-Sixth, exception (d).

¹¹⁰ *Id.* at exception (e).

¹¹¹ *Id.* at exception (f).

¹¹² *Id.* at exception (h).

¹¹³ See *Republican Co. v. Appeals Court*, 442 Mass. 218, 223 n.9, 812 N.E.2d 887, 893 n.9 (2004) (statutory exception for investigatory materials does not apply to court records).

APPENDIX A

Public Access to Criminal Records through the Criminal History Systems Board

The Criminal Offender Record Information Act (G. L. c. 6, § 172) allows access to an individual's criminal record through the Criminal History Systems Board (CHSB) under the circumstances outlined below. All requests should be mailed to the Criminal History Systems Board, 200 Arlington St., Suite 2200, Chelsea, MA 02150, Attn: CORI Unit. No walk-in or fax service is available. Instructions on "How to Read a Criminal Record" are available from the "Criminal Offender Record Information Services" section of CHSB's internet website at www.state.ma.us/chsb.

PUBLIC ACCESS TO CRIMINAL RECORDS

Pursuant to 803 Code Mass. Regs. § 3.06, the public may gain access through the CHSB to the adult criminal record of any individual who:

1	(a)	<u>Was ever given a committed or suspended sentence:</u> was ever convicted of a crime and sentenced to incarceration (even if the sentence was suspended), or
	(b)	<u>Was ever convicted of a 5-year felony:</u> was ever convicted of a felony potentially punishable by incarceration for 5 years or more,
<i>and</i>		
2	(a)	<u>Is now serving a sentence:</u> is presently incarcerated, or is on probation or parole, or
	(b)	<u>Was discharged in the past year for a misdemeanor:</u> within the last year was released from all incarceration, probation, parole or supervision for a misdemeanor conviction, or
	(c)	<u>Was discharged in the past 2 years for a felony:</u> within the last 2 years was released from all incarceration, probation, parole or supervision for a felony conviction, or
	(d)	<u>Was discharged in the past 3 years after violating or being denied parole on a DOC sentence:</u> within the past 3 years was finally discharged from a committed sentence to the Department of Correction, after being returned to custody as a parole violator, or after being denied parole. ¹¹⁴

Such information is available by mailing to the CHSB at the above address, for each individual whose record is being sought, the "Request for Publicly Accessible Massachusetts CORI" form (available from the CHSB's website at www.state.ma.us/chsb) along with a check or money order for the \$30 processing fee (payable to "Commonwealth of Massachusetts"), and a self-addressed, stamped envelope. The individual's full name and date of birth is required; social security number is requested but not required. The CHSB will respond with a computer printout of all publicly-accessible conviction data for that individual. Requests are processed in the order received.

¹¹⁴ Note that the 2-year, rather than the 3-year, provision applies to defendants sentenced to DOC custody who have been paroled and have *not* been returned to custody for parole violations, or who have waived parole.

ACCESS TO ONE’S OWN CRIMINAL RECORD¹¹⁵

Pursuant to 803 Code Mass. Regs. § 6.02, individuals may obtain complete copies of their own criminal record by mailing to the CHSB at the above address the notarized “Personal Massachusetts Criminal Record Request Form” (available from the CHSB’s website at www.state.ma.us/chsb), along with a stamped, self-addressed envelope, and a check for the \$25 access fee (payable to “Commonwealth of Massachusetts”).¹¹⁶ The individual’s full name and date of birth is required; social security number is requested but not required. Copies of the form and instructions are also available in Spanish or French from the CHSB’s website.

ATTORNEY ACCESS TO CLIENT OR WITNESS CRIMINAL RECORDS

- *Client’s criminal record.* Pursuant to 803 Code Mass. Regs. § 6.06, an attorney may obtain a complete copy of a client’s criminal record, by obtaining the client’s notarized signature on the “Advocate’s Authorization to Seek Massachusetts CORI” form (available from the CHSB’s website at www.state.ma.us/chsb), and mailing it to the CHSB at the above address, Attn: CORI Advocate Authorization, along with a stamped, self-addressed envelope, and a check for the \$25 access fee (payable to “Commonwealth of Massachusetts”).¹²⁶
- *Witness’s criminal record.* Under a general grant of access by the CHSB pursuant to G.L. c. 6, § 172(c), attorneys of record in civil, criminal and administrative proceedings may obtain the criminal records of non-clients for witness impeachment or trial strategy purposes. Such information is available by mailing to the CHSB a copy of the motion for such access that has been allowed by the trial judge and that identifies the witness’s name and birth date and the type of CORI data to be accessed (e.g., all criminal record information, conviction data only, etc.), along with the attorney’s affidavit that the data will be used solely for witness impeachment or trial strategy purposes and will not be disclosed to unauthorized persons or in violation of G.L. c. 6, § 167 et. seq., a check for the \$30 access fee (payable to “Commonwealth of Massachusetts”), and a stamped, self-addressed envelope. A court-appointed attorney should enclose a copy of the “Notice of Assignment of Counsel” form in order to have the fee waived.

Attorney questions may be directed to the CHSB’s CORI Unit at 617/660-4640 or its Legal Department at 617/660-4760.

VICTIM ACCESS TO OFFENDER INFORMATION

Pursuant to 803 Code Mass. Regs. § 3.04, the CHSB will certify victims of crime, witnesses to crime, and family members of homicide victims to receive CORI information that relates to the offense in which the victim or witness is involved, and other information deemed reasonably necessary for the security and well being of the victim or witness.

¹¹⁵ It is unlawful to request or require a person to provide a copy of their own CORI, except as permitted by the CORI statute.

¹¹⁶ Note that the \$25 fee for access to one’s own criminal record, or for access by one’s attorney or other authorized advocate, is lower than the \$30 general access fee. See G.L. c. 6, § 172A. The access fee is waived if the individual is indigent, as defined in G.L. c. 261, § 27A.

TRIAL COURT RULE VIII

Uniform Rules on Impoundment Procedure

Rule 1. Scope and Applicability of Rules

These rules govern impoundment in civil proceedings in every Department of the Trial Court.

As used herein, “impoundment” shall mean the act of keeping some or all of the papers, documents, or exhibits, or portions thereof, in a case separate and unavailable for public inspection. It shall also be deemed to include the act of keeping dockets, indices, and other records unavailable for public inspection. The term “clerk” shall mean Clerk-Magistrate, Register of Probate, Recorder of the Land Court, and their assistants.

Except as otherwise provided in Rule 11, these rules shall be inapplicable to court papers, documents, exhibits, dockets, indices, and other records which are required to be impounded by statute, court rule, or standing order.

Where impoundment is sought in connection with discovery, these rules shall be applied in a manner consistent with the provisions of Rule 26(c) of the Massachusetts Rules of Civil Procedure, Rule 26(c) of the District/Municipal Courts Rules of Civil Procedure, and Rule 26(c) of the Massachusetts Rules of Domestic Relations Procedure.

These rules shall not be construed to deprive a person of any rights or remedies regarding impoundment which are otherwise available under law.

Rule 2. Motion for Impoundment

A request for impoundment shall be made by written motion which shall state the grounds therefor and shall include a written statement of reasons in support thereof. The motion shall describe with particularity the material sought to be impounded and the period of time for which impoundment is sought.

A motion for impoundment shall be accompanied by affidavit in support thereof. Unless otherwise provided herein, the rules governing motions and affidavits in civil proceedings generally shall apply to requests for impoundment.

An order of impoundment may be requested prior to the filing of the material sought to be impounded.

Rule 3. Ex Parte Impoundment

An ex parte order of impoundment may be granted by the court without notice only upon written motion supported by affidavit in the manner provided in Rule 2 and only upon a showing that immediate and irreparable injury may result before a party or interested third person can be heard in opposition. An ex parte order of impoundment shall be endorsed with the date of issuance; shall be filed forthwith in the clerk’s office and entered of record; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed, the court extends the order.

If an order of impoundment is granted without notice, the matter shall be set down for hearing at the earliest possible time, and in any event within ten days. On two days’ notice to the party who obtained the order of impoundment without notice or on such shorter notice as the court may prescribe, a party or interested third person may move for modification or termination.

An ex parte order of impoundment may be requested prior to the filing of the material sought to be impounded.

Rule 4. Notice

Service of the motion for impoundment and affidavit shall be made on all parties in accordance with Rule 5 of the Massachusetts Rules of Civil Procedure. In the event an order of impoundment is sought at the time of, or prior to, service of the original complaint, service shall be made in accordance with Rule 4 of the Massachusetts Rules of Civil Procedure. The time periods for hearing shall be as set forth in Rule 6 of the Massachusetts Rules of Civil Procedure.

The court may, prior to hearing, order notice to be given to interested third persons who may not be parties to the action, including persons named in the material sought to be impounded. Notice to such interested third persons shall be given in such manner as the court may direct.

Service shall be proved by affidavit containing a particular statement thereof, including the names and addresses of all parties and interested third persons who have been given notice.

Rule 5. Opposition to Request for Impoundment

Any party or interested third person who has been notified in accordance with Rule 4 of these rules may serve opposing affidavits not later than one day before the hearing, unless the court permits them to be served at some other time. Service of opposing affidavits shall be made in accordance with Rule 5 of the Massachusetts Rules of Civil Procedure.

Rule 6. Motion by Third Persons to be Heard

A person who has not been notified in accordance with Rule 4 of these rules and who desires to be heard in order to request or oppose impoundment may serve on all parties a written motion supported by affidavit. If impoundment is desired, the provisions of Rule 2 of these rules concerning motions and affidavits and Rule 4 of these rules concerning notice shall be applicable. The time periods for service of the motion to be heard and for setting of a hearing date shall be as set forth in Rule 6 of the Massachusetts Rules of Civil Procedure.

Rule 7. Hearing

An order of impoundment may be entered by the court, after hearing, for good cause shown and in accordance with applicable law. In determining good cause, the court shall consider all relevant factors, including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason(s) for the request. Agreement of all parties or interested third persons in favor of impoundment shall not, in itself, be sufficient to constitute good cause.

Interested third persons who are notified in accordance with Rule 4 of these rules and those third persons who have filed motions to be heard in accordance with Rule 6 of these rules may, in the court's discretion, be given an opportunity to be heard.

Where a public hearing may risk disclosure of the information sought to be impounded, the court may close the hearing to the public. If a hearing is closed to the public, a record of the proceedings shall be preserved stenographically or by a recording device. Appropriate steps shall be taken to preserve the confidentiality of the record.

Rule 8. Order of Impoundment

An order of impoundment, whether ex parte or after notice, may be made only upon written findings. An order of impoundment shall specifically state what material is to be impounded, and, where appropriate, may specify how impoundment is to be implemented. An order of impoundment shall be endorsed with the date of issuance and shall specify the duration of the order.

In its order, the court may allow persons other than those described in Rule 9 of these rules to have access to impounded material, and may order that appropriate deletions or notations be made in the civil docket and indices kept by the clerk.

Rule 9. Clerk's Duties

Upon entry of an order of impoundment, the clerk shall make a notation in the civil docket indicating what material has been impounded. All impounded material shall be kept separate from other papers in the case and shall not be available for public inspection. Such impounded material shall be available to the court, the attorneys of record, the parties to the case, and the clerk, unless otherwise ordered by the court.

Upon expiration or other termination of the order of impoundment, the material shall be returned to the file, unless other arrangements have been made, and the docket marked accordingly.

Rule 10. Modification or Termination

A party or any interested third person, whether or not notified under Rule 4 of these rules, may, by motion supported by affidavit, seek to modify or terminate an order of impoundment. Such motion shall be served in accordance with the provisions of Rule 5 of the Massachusetts Rules of Civil Procedure upon all parties, all interested third persons who were notified pursuant to Rule 4 of these rules, and any other person as ordered by the court.

No order of impoundment may be modified or terminated, except upon order of the court and upon written findings in support thereof.

Rule 11. Material Impounded by Statute or Rule

This rule applies to requests for relief from impoundment in cases where material is required to be impounded by statute, court rule, or standing order, except where a different procedure is otherwise provided.

Relief from impoundment may be sought by motion supported by affidavit, and shall be granted by the court only upon written findings. The procedure otherwise set forth in these rules shall govern requests for relief from impoundment to the extent practicable.

Rule 12. Review

An order impounding or refusing to impound material shall be subject to review by a single justice of an appellate court in accordance with provisions of law and consistent with the procedures established in Rule 1:15 of the Rules of the Supreme Judicial Court.

APPENDIX C

Excerpt from SUPREME JUDICIAL COURT RULE 1:15

Impoundment Procedure

(Applicable to the Supreme Judicial Court and Appeals Court)

. . .

Section 2. Maintaining Confidentiality of Impounded Material in Cases on Appeal.

(a) *Duties of Trial Court Clerks.* When an appeal has been taken in a case in which material has been impounded, the clerk of the trial court shall notify the clerk of the appellate court, in writing, at the time of the transmission of the record that material was impounded by the trial court. Such notification shall specify those papers, documents or exhibits, or portions thereof, which were impounded below and shall include a copy of the order of impoundment, if any, or a reference to other authority for the impoundment.

. . .

APPENDIX D

Trial Court Administrative Directive No. 2-93

“Public Access to Court Records of Criminal Proceedings”

THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
OFFICE OF THE CHIEF ADMINISTRATIVE JUSTICE
Two Center Plaza
Boston, Massachusetts 02108

ADMINISTRATIVE DIRECTIVE NO. 2-93

**(This Administrative Directive Supersedes
Administrative Directive No. 1-84)**

To: Chief Justices of the Trial Court
Justices of the Trial Court
Commissioner of Probation
Clerk-Magistrates of the Superior Court, District Court, Boston Municipal Court, and Housing Court Departments

From: John E. Fenton, Jr.
Chief Justice for Administration and Management

Date: April 27, 1993

Re: **Public Access to Court Records of Criminal Proceedings**

Administrative Directive No. 1-84, dated March 21, 1984, is hereby revoked in light of the recent decision of the United States District Court for the District of Massachusetts in Globe Newspaper Co., et al. vs. Fenton, et al., 819 F.Supp. 89 (D. Mass. 1993).

To promote uniformity of practice within the various Departments of the Trial Court exercising criminal jurisdiction, the following procedures have been established.

1. The alphabetical indices of the names of defendants in criminal cases which clerk-magistrates are obligated to maintain pursuant to G.L. c. 221, § 23 shall be available to the public except as to those cases which have been sealed or impounded.
2. All identification of defendants in sealed or impounded criminal cases shall be removed from said alphabetical indices immediately after the criminal case is sealed or impounded and shall be maintained in separate indices not available to the public. The Clerk-Magistrate, or his or her designee, shall periodically review the alphabetical indices of criminal cases to ensure the timely removal of sealed or impounded criminal cases.
3. Alphabetical indices of defendants in criminal cases shall contain the defendant's name and case number.
4. Public access to court records shall be subject to reasonable administrative restrictions as to time, place, and manner for inspection of such records.

To further promote uniformity and to eliminate uncertainty in providing public access to court records the following

may be instructive:

Docket books of criminal cases are public records and are available for public inspection;

Case files are public records and are available for public inspection unless otherwise restricted by law or unless they have been sealed or impounded; and

Access to public records shall not be restricted to any class or group of persons.

Nothing in this directive shall affect the withholding from public disclosure of any materials which have been impounded, sealed, or restricted by law or court order.

_____/s/
John E. Fenton, Jr.
Chief Justice for
Administration and Management

II. SEALING CRIMINAL RECORDS

- *Definition.* Sealing “refers to those steps taken to segregate certain records from the generality of records and to ensure their confidentiality to the extent specified in the controlling statute.”¹¹⁷ The charts on pp. 42-43 summarize existing statutory provisions regarding sealing of criminal and delinquency records.
- *Statutes preempt any inherent authority.* Judges have no residual inherent or ancillary authority to seal adult criminal records that are ineligible for sealing under existing statutes.¹¹⁸
- *Forms for § 100A or 100B petitions.* Petitions under G.L. c. 276, §§ 100A or 100B to seal older criminal or delinquency records are submitted directly to the Commissioner of Probation on the “PETITION TO SEAL” form reproduced at p.46.
- *Forms for § 100C petitions.* Motions to seal criminal records under G.L. c. 276, § 100C, G.L. c. 94C, §§ 34 or 44, or St. 1973, c. 1102, must be submitted to a judge (see *infra*). If allowed, the “PETITION TO SEAL RECORD OF ADULT CRIMINAL AND/OR JUVENILE MASSACHUSETTS COURT APPEARANCES AND DISPOSITIONS” form reproduced at p.47 must be completed, signed by the judge, and submitted to the Commissioner of Probation’s office.
- *Mechanics.* The District Court has by regulation defined the mechanisms to be used to physically secure court records that have been sealed.¹¹⁹

¹¹⁷ *Police Comm’r of Boston v. Municipal Court of the Dorchester Dist.*, 374 Mass. 640, 648, 374 N.E.2d 272, 277 (1978).

¹¹⁸ *Commonwealth v. Vickey*, 381 Mass. 762, 766, 412 N.E.2d 877, 880 (1980) (no inherent power to seal conviction record that has not met the waiting period prescribed in G.L. c. 276, § 100A).

¹¹⁹ “When a District Court or its Clerk or Probation Officer is required to seal a criminal or juvenile record or entry pursuant to statute, the following procedure shall be followed in each department:

“1. *Index cards.* If all of the information on an index card is to be sealed, the card shall be permanently removed from the index and placed with the pertinent case papers.

“If only part of the information on the index card is to be sealed, the index card shall be placed with the pertinent case papers and a new index card shall be prepared, omitting the information to be sealed. The new index card shall then be used in place of the original.

“2. *Dockets.* A copy of the pertinent docket shall be placed with the case papers. The copy shall bear the date on which the record is sealed, and a certification signed by the clerk or his designee that the copy is a true copy of the docket. The original docket entries shall then be covered with opaque tape so that none of the information pertaining to the record or entry can be read. The original docket sheet shall remain in the docket, and on the tape shall be marked the legend, “Sealed Record.”

“3. *Case papers and files.* The case papers, any copies made as required above and all pertinent files shall be placed in a sealed envelope which shall contain on the front 1) the name of the defendant, 2) in the case of records in the clerk’s department the docket number(s) of the case(s) enclosed therein, and 3) the words “RECORD SEALED PURSUANT TO G.L. CH. ___, SEC. ___, _____, 19___. The pertinent chapter and section number of the General Laws, and the date the records were sealed in the envelope, shall then be indicated in the appropriate spaces. Sealed record envelopes shall be kept in a secure place, and shall be arranged according to name of the defendant.

“4. *Sealed records index.* Each department shall keep a sealed records index, which index in the case of the clerk’s department shall be arranged by both name of the defendant and docket number, and in the case of the probation department by name of the defendant only. The index shall indicate the name of the defendant; in the case of records in the clerk’s department, the docket number(s) of the case(s) sealed; and in the case of records in the probation department, the date of birth of the defendant. This index shall not be available for public use.

“5. *Confidentiality of sealed records.* Sealed records shall be used and be available only in accordance with the pertinent statutes. The sealed records index shall not be available to the public. In the event a sealed record is unsealed for any reason, the date of unsealing and the name of the person using the record shall be noted on the front of the envelope, and after use the envelope shall be resealed.

“6. *Administrative coordination.* Whenever a record or entry in one department of the court is sealed, that department shall notify in writing the other departments of the court.

- §§ 100A-100B and § 100C procedures not mutually exclusive. The provisions of G.L. c. 276, §§ 100A and 100B are applicable to cases that did not result in a criminal conviction or delinquency adjudication, and did not qualify for immediate sealing under § 100C. *Commonwealth v. Gavin G.*, 437 Mass. 470, 478-480, 772 N.E.2d 1067, 1073-1074 (2002).
- *The Pokaski standard for sealing under § 100C.* The case of *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989), greatly restricted the discretionary sealing of records pursuant to G.L. c. 276, § 100C. In substance, *Pokaski* held:
 - “Not guilty” and “No probable cause” cases. The automatic record-sealing provisions of G.L. c. 276, § 100C for criminal cases ending with a “not guilty” or “no probable cause” finding are invalid because they violate the First Amendment’s presumption of access to court records. Such records may remain sealed after May 13, 1989 only if a judge has granted a motion to seal that particular record, and the judicial order is accompanied by “specific, on the record findings that sealing was necessary to effectuate a compelling governmental interest” that in this particular instance outweighs the public’s First Amendment presumption of access, and that sealing is the least restrictive means of achieving that interest.
 - “Dismissed without probation” and “Nol prossed” cases. To avoid constitutional infirmity, the statutory standard in § 100C (“that substantial justice would best be served”) for discretionarily sealing a case that was either dismissed without probation or nol prossed must be interpreted to include the *Pokaski* standard outlined above. After May 13, 1989, such a record may remain sealed only if the closure order in that case is supported by “specific, on the record findings” that such is the case in this instance.
 - “No bill” cases. The provision of § 100C requiring the automatic sealing of a case terminating in a grand jury’s “no bill” is valid, since historically there is no First Amendment right of access to the records of grand jury matters. Courts may continue to deny public access to such records.

The First Circuit believed that most defendants can advance only “general reputation and privacy interests” and are therefore unlikely to meet this standard.¹²⁰ Massachusetts appellate courts have been

“Note:

“This procedure should be used in cases to be sealed under G.L. c. 276, § 100A, 100B, and 100C, G.L. c. 94C, §§ 34 and 44, and any other statutes requiring sealing. The purpose of sealing is to remove physically the record or entries in question from the records of the court that are ordinarily available for viewing. However, care should be taken that indices and dockets on which entries have been sealed remain neat and otherwise usable. Removal of the opaque tape is not contemplated, and any further use of the records must be made by removing the contents of the sealed record envelope. Copies should be made by a photocopying process whenever possible, but typed copies may be used where photocopying is impractical.

“It is important that paragraph 6 be observed carefully in order that the several departments of the court can coordinate their efforts. It would be helpful if the clerk’s department and the probation department as a matter of practice would also communicate in advance of sealing a defendant’s record in order to minimize confusion.

“Sealed records should be used only in the manner allowed by statute.”

District Court Administrative Regulation No. 1-74, ‘Sealing of Records’ (Effective date: February 1, 1974).

¹²⁰ “We suspect, however, that defendants rarely will be successful. The most likely basis for denying access to records or proceedings—the protection of a defendant’s fair trial rights—usually will not be a concern once a case has ended, except perhaps in situations where there are related proceedings. In addition, because both the proceedings and case files already have been publicly accessible, defendants must convince a court or administrative body that their privacy rights have not been lost irretrievably. Nevertheless, while prior publicity weighs strongly against sealing, we do not believe it presents an insurmountable obstacle.

“... Records cannot be sealed on the basis of general reputation and privacy interests. The Commonwealth, therefore, will need to know the specific harms that defendants will suffer

“In most cases, we expect that defendants who request the sealing of records will be unable to make out even a prima facie case for sealing. Only when a defendant makes that showing would it be necessary to conduct a hearing in which the press participates. Thus, in all but a few cases, the defendant’s request would be denied summarily and the records would remain available

somewhat more sanguine about the percentage of defendants who may be able to meet the *Pokaski* standard. The Supreme Judicial Court has indicated that the reason why the case was dismissed “would have a direct bearing . . . on the defendant’s claim that he may suffer an unfair stigma from the information remaining accessible.” The defendant must also show “[s]omething more than a general interest in reputation and privacy” and “demonstrate that he or she risks suffering specific harm if the record is not sealed.” While this need not rise to the level of “actual likelihood of immediate harm,” the defendant must at least show that “it is substantially probable that future opportunities are likely to be affected adversely” if the record is not sealed.¹²¹

“Massachusetts implicitly concedes that *permanent* sealing is not justified, and should not occur, in every case that ends without a conviction. Indeed, if lack of a conviction alone were sufficient to warrant permanent sealing, then . . . by definition, every defendant would meet his or her burden. . . .” (citations omitted). *Pokaski*, 868 F.2d at 506 n.7, 507 n.18, 507-508, 506.

The Supreme Court has noted that “[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law.” *Boerne, Texas v. Flores*, 521 U.S. 507, 534, 117 S.Ct.2157, 2171 (1997).

¹²¹ “The [*Pokaski*] court concluded that, under the First Amendment, the press and the public possessed a constitutional right of access to judicial records which could be overcome only by a showing of a compelling governmental interest, and on terms that represent the least restrictive alternative

“The court in *Pokaski* anticipated that the proportion of cases in which a defendant successfully made out a prima facie case would be small It seems likely that, in fact, only a small number of defendants seek the protection of this legislation. It is possible that most of these few cases will warrant more than a summary dismissal”

“To succeed on a petition to seal under § 100C, second par., a defendant must show that the interests of confidentiality and avoiding harm have specific application to him or her. The ‘substantial justice’ requirement in § 100C, second par., will not be met unless it is demonstrated, first at the preliminary hearing and, if the matter proceeds that far, at the final hearing, that the value of sealing to the defendant clearly outweighs the constitutionally-based value of the record remaining open to society.

“The judge should consider all relevant information in deciding whether substantial justice would be served by sealing. It would clearly be necessary to know the reason for the nolle prosequi or dismissal. The defendant’s case for confidentiality becomes stronger if the dropping of the charge is premised on a ‘mistake’ in bringing it (for example, defendant was misidentified or police acquired credible information exonerating defendant), and it is correspondingly weakened if the prosecutor is simply unable to prove the charge (for example, if lack of prosecution stems from refusal of victim or essential witness to cooperate without indication that charge was wrongly brought in first place). In this respect, the fact that law enforcement officers had probable cause to believe that the defendant acted in a particularly unlawful manner would have a direct bearing on the value of the information and on the defendant’s claim that he may suffer an unfair stigma from the information remaining accessible. A reasoned objection at any time by the prosecutor, victim, probation department, police, or the media would pose a very serious obstacle to the petition.

“In connection with the ‘substantial justice’ requirement, the defendant would have to demonstrate that he or she risks suffering specific harm if the record is not sealed. We do not think, however, that the actual likelihood of immediate harm is a necessary component of a defendant’s proof, if the factors discussed above strongly favor sealing. The risk of harm posed by the existence of an arrest record, notwithstanding the ultimate disposition of the case, has long been recognized by this court and other courts. With the advent of computerization and the increased accessibility that it provides, the risk of harm from an arrest record has increased substantially. A judge weighing a petition under § 100C, second par., may consider the position of the petitioner and whether, in view of that position, it is substantially probable that future opportunities are likely to be affected adversely by the existence of an arrest record” (citations omitted). *Commonwealth v. Doe*, 420 Mass. 142, 149 n.7, 148, 151-153, 648 N.E.2d 1255, 149 n.7, 1259-1261 (1995).

Under the *Pokaski* and *Doe* criteria, “[a]s a general proposition, sealing is to be reserved for the exceptional case. Something more than a general interest in reputation and privacy should be the ground for sealing. The case for sealing [a dismissed or nol prossed] case is stronger if the prosecution was abandoned because it was founded on a mistake. It is peculiarly unjust to saddle an individual with a record in a case that should never have been begun. If the prosecution was abandoned because an essential witness was on vacation and the government decided, on balance, that it was not worth pressing the matter further some other day, then the argument for sealing rests on softer ground. The District Court judge, on remand, should also consider whether the position of the defendant is such that ‘it is substantially probable that future opportunities are likely to be affected adversely by the existence of an arrest record’” (citations omitted). *Commonwealth v. Roberts*, 39 Mass. App. Ct. 355, 358, 656 N.E.2d 1260, 1262 (1995).

- *Procedure for Pokaski motions to seal.* The following procedures apply to sealing motions governed by the *Pokaski* opinion (i.e., “Not guilty,” “No probable cause,” “Dismissed without probation” and “Nol prossed” cases):
 - *Written motion.* The defendant must file a motion, at the end of the case or at any time thereafter,¹²² setting out detailed facts that would justify overriding the presumption of public access.¹²³ The form motion reproduced at p. 44 may be used for this purpose.¹²⁴
 - *Informal hearing to demonstrate prima facie case for sealing.* A judge should initially consider the motion at an preliminary hearing to determine whether the defendant has made out even a prima facie case for sealing. If not, the motion should be summarily denied.¹²⁵
 - *Notice and formal hearing.* If the defendant makes out a prima facie case for sealing at the informal hearing, a formal hearing must be held. Advance notice of the formal hearing must be given to the prosecutor, the probation department and any other interested party, and posted on a court bulletin board for at least 7 days.¹²⁶ Prior to the formal hearing, the record of the preliminary hearing is

¹²² “[D]efendants [may] move for the permanent sealing of their records at the conclusion of trials and probable cause hearings” With regard “to defendants whose need for confidentiality arises at some time after the case has ended . . . if circumstances change, defendants may petition the court at that time for the sealing of their records.” Motions may also be filed at any time by the “[m]any defendants who may have foregone an opportunity to argue for sealing at the close of their case, relying instead on the automatic sealing provision of § 100C” now invalidated or reinterpreted. *Pokaski*, 868 F.2d at 507, 508, 511.

¹²³ “Records cannot be sealed on the basis of general reputation and privacy interests. The [judge], therefore, will need to know the specific harms that defendants will suffer, and we do not see how the [judge] would be fully informed about these personal circumstances without direct input from defendants [T]he burden of overcoming inertia [will] now fall on defendants, where it belongs.” *Pokaski*, 868 F.2d at 507 n.18 & 507.

¹²⁴ The form was originally distributed with District Court Memorandum, “First Circuit decision invalidating major record-sealing provisions of G.L. c. 276, § 100C” (Trans. 306, May 5, 1989).

¹²⁵ “We do not anticipate that this scheme would place a serious economic burden on the public or create significant congestion in the Commonwealth’s already busy courts. We suspect that many defendants would not make the effort in the first place to detail reasons supporting a request for sealing. Even when they do, a full hearing would be necessary only rarely. In most cases, we expect that defendants who request the sealing of records will be unable to make out even a prima facie case for sealing. Only when a defendant makes that showing would it be necessary to conduct a hearing in which the press participates. Thus, in all but a few cases, the defendant’s request would be denied summarily and the records would remain available at no expense to the public” *Pokaski*, 868 F.2d at 507-508.

“In the *Pokaski* decision, the [First Circuit] Court of Appeals suggested a two-stage proceeding for hearing petitions to seal under § 100C, second par. At the first, informal stage, which would occur either at the end of the hearing in which the case was disposed of, or at such other time as the defendant petitions for sealing, a preliminary hearing would be held to determine whether the defendant has made out a prima facie case in favor of sealing. If the defendant fails to make a prima facie showing at this preliminary hearing, the petition to seal should be denied summarily. Only if the defendant succeeded at this stage would a more extensive hearing be necessary. For a preliminary hearing occurring at the conclusion of the public hearing in which the criminal case was disposed of, no additional notice would be necessary. The underlying hearing, from which the records arose, would be accessible, and could be attended by any member of the public or press interested in observing the proceedings. The defendant’s petition to seal the record would simply be a portion of the ongoing proceeding. If the preliminary hearing was held some time after the underlying case has been disposed of, notice may be provided by means of an entry on the public docket sheets, as is normal procedure.” *Doe*, 420 Mass. at 149-150, 648 N.E.2d at 1259-1260.

¹²⁶ “If the defendant succeeds in making a prima facie showing that sealing is appropriate, a more extensive hearing, with notice, would be necessary. At this second stage, at which arguments for and against sealing would be made, notice should be afforded by means of posting in a conspicuous place at the court for an adequate period sufficient (we suggest a minimum of seven days) ‘to give the public and press an opportunity to intervene and present their objections to the court.’ As far as the media are concerned, while members of the press cannot be expected to be present continuously in all court sessions, press representatives are regularly present in, and are familiar with, the clerks’ offices and the courthouses of the Commonwealth. Additionally, notice of a second stage hearing should be given to the prosecutor, who should be advised to inform the victim of the scheduled hearing and indicate to the victim that he or she may appear and be heard, to the Department of Probation, and to any other party deemed to have an interest in the case” (citation omitted). *Doe*, 420 Mass. at 150, 648 N.E.2d at 1260.

probably available to the public unless specifically impounded by the judge.¹²⁷

- *Written findings.* If the judge allows the motion to seal after the formal hearing, the judge must make specific findings on the record. The form reproduced at p. 45 may be used for this purpose.¹²⁸
- *Notice to the Commissioner of Probation.* If the judge allows the motion to seal, the petition form used to notify the Office of the Commissioner of Probation of the court's order (reproduced at p. 47) must be filled out and signed by the judge.
- *Appeal.* A judge's decision regarding the sealing of criminal records is appealable to the Appeals Court.¹²⁹

¹²⁷ "In my opinion, the [*Pokaski*] decision does not give clear guidance as to whether a case record (including its audiotape) may be withheld from public inspection during the interim between the informal hearing and the full hearing. This may have to await future appellate clarification. For now, I recommend that clerk-magistrates assume that they are *not* authorized to withhold such records during that interim period unless a judge has entered a specific impoundment order, supported by appropriate findings." District Court Memorandum, "First Circuit decision invalidating major record-sealing provisions of G.L. c. 276, § 100C" at 6 (Trans. 306, May 5, 1989).

¹²⁸ "[B]efore access may be denied, trial courts must make 'specific, on the record findings' showing that closure is necessary to achieve a compelling interest." Such records may not be withheld from public inspection "unless the Commonwealth can demonstrate that such findings were made." *Pokaski*, 868 F.2d at 510. "[I]f the judge decides to allow a petition to seal, there must be specific findings on the record setting forth the interests considered by the judge and the reasons for the order directing that such sealing occur." *Doe*, 420 Mass. at 153-154, 648 N.E.2d at 1261.

The sample form was developed by the District Court Committee on Criminal Proceedings.

¹²⁹ *Commonwealth v. S.M.F.*, 440 Mass. App. Ct. 42, 43 n.1, 660 N.E.2d 701, 702 n.1 (1996).

STATUTES GOVERNING SEALING OF COURT RECORDS
AS MODIFIED BY *Globe Newspaper v. Pokaski*, 868 F.2d 497 (1st Cir. 1989)

SITUATION	SEALING PROVISIONS	AVAILABLE LATER?
<p>G.L. c. 276, § 100A</p> <p>ADULT CRIMINAL DISPOSITIONS except for violations of: c.140, §§ 121-131H (firearms) c. 268 (perjury, escape, etc.) c. 268A (State Ethics Act)</p>	<p>Upon application, Commissioner of Probation shall seal record and notify court clerk and chief probation officer to do the same, if:</p> <ul style="list-style-type: none"> • Court supervision, probation or sentence” has been terminated: <ul style="list-style-type: none"> • on all MISDEMEANORS for at least 10 YEARS; <i>and</i> • on all FELONIES for at least 15 YEARS; <i>and</i> • There have been no new criminal convictions (except motor vehicle offenses with maximum \$50 fine) or imprisonment in Massachusetts or elsewhere in last 10 YEARS; <i>and</i> • There are no convictions to which this section does not apply; <i>and</i> • Defendant is not required to register as a sex offender for such conviction (G.L. c. 6, § 178G). 	<p>Available for “imposing sentence in subsequent criminal proceedings.”</p>
<p>G.L. c. 276, § 100B</p> <p>JUVENILE DELINQUENCY DISPOSITIONS</p>	<p>Upon application, Commissioner of Probation shall seal record and notify court clerk, chief probation officer and Department of Youth Services to do the same, if:</p> <ul style="list-style-type: none"> • “Court supervision, probation, commitment or parole” has been terminated on all delinquency charges for at least 3 YEARS; <i>and</i> • There have been no new delinquency adjudications or criminal convictions (except motor vehicle offenses with maximum \$50 fine) and no delinquency commitments or criminal imprisonment in Massachusetts or elsewhere in last 3 YEARS; <i>and</i> • Defendant is not required to register as a sex offender for such conviction (G.L. c. 6, § 178G). 	<p>Available at new delinquency or criminal sentencing. Otherwise Commissioner shall answer “sealed delinquency record over 3 years old” upon court inquiry.</p>
<p>G.L. c. 276, § 100C, ¶ 1</p> <p>“NO BILL” FROM GRAND JURY</p>	<p>Unless defendant requests otherwise, Commissioner of Probation, court clerk and chief probation officer shall seal automatically. The <i>Pokaski</i> decision affirmed the continued validity of such sealings.</p>	<p>Probation officer not to reveal to judge sentencing for subsequent offense.</p>
<p>G.L. c. 276, § 100C, ¶ 1</p> <p>“NOT GUILTY” or “NO PROBABLE CAUSE” DISPOSITIONS</p>	<p>Although § 100C provides for automatic sealing (as in “no bill” cases above), the <i>Pokaski</i> decision held that such records may be sealed, or old records remain sealed, only upon a judicial order accompanied by specific findings that in this particular case sealing is necessary to achieve a compelling government interest that outweighs the public’s First Amendment presumption of access.</p>	
<p>G.L. c. 276, § 100C, ¶ 2</p> <p>“NOL PROSSED” or “DISMISSED WITHOUT PROBATION” DISPOSITIONS</p>	<p>Although § 100C provides for discretionary sealing if “substantial justice would best be served,” the <i>Pokaski</i> decision held that such records may be sealed, or remain sealed, only upon a judicial order accompanied by specific findings that in this particular case sealing is necessary to achieve a compelling government interest that outweighs the public’s First Amendment presumption of access.</p>	<p>Available for sentencing “[a]fter a finding or verdict of guilty on a subsequent offense.”</p>
<p>G.L. c. 127, § 152, ¶ 5</p> <p>PARDONED OFFENSES</p>	<p>When granting a pardon, the Governor “shall direct all proper officers to seal all records relating to the offense for which the person received the pardon.”</p>	<p>Available when sentencing for later offenses, and in court proceedings for specified c.265 offenses.</p>

See next chart for drug possession charges . . .

STATUTES GOVERNING SEALING OF DRUG POSSESSION CHARGES		
SITUATION	SEALING PROVISIONS	AVAILABLE TO COURT LATER?
<p>G.L. c. 94C, § 34, ¶ 2</p> <p>FIRST-OFFENSE POSSESSION OF CONTROLLED SUBSTANCE OTHER THAN MARIHUANA or a Class E controlled substance</p>	<p>Section 34 provides that where:</p> <ul style="list-style-type: none"> No prior drug conviction in Massachusetts, <i>and</i> Defendant has successfully completed conditions of a continuance without a finding, or conditions of probation after a guilty finding, <p>judge may “dismiss the proceedings” and seal “all official records relating to [the] arrest, indictment, conviction, probation, continuance or discharge” except non-public police records.</p> <p>Assuming that the <i>Pokaski</i> decision applies to such records, they may be sealed, or remain sealed, only upon a judicial order accompanied by specific findings that in this particular case sealing is necessary to achieve a compelling governmental interest that outweighs the public’s First Amendment presumption of access.</p>	<p>Any conviction so sealed “shall not be deemed a conviction . . . for any purpose.”</p>
<p>G.L. c. 94C, § 34, ¶ 3</p> <p>FIRST-OFFENSE POSSESSION OF MARIHUANA or a Class E controlled substance since 7/1/72</p>	<p>Section 34 provides that probation is the only permissible sentence where:</p> <ul style="list-style-type: none"> No prior drug conviction in Massachusetts, <i>and</i> Defendant does not object, <p><i>unless</i> judge files a written statement of reasons for not so doing. Upon successful completion of probation, “the case shall be dismissed and records shall be sealed.”</p> <p>Assuming that the <i>Pokaski</i> decision applies to such records, they may be sealed, or remain sealed, only upon a judicial order accompanied by specific findings that in this particular case sealing is necessary to achieve a compelling governmental interest that outweighs the public’s First Amendment presumption of access.</p>	<p>Section 34 is silent.</p>
<p>St. 1973, c. 1102, § 1</p> <p>FIRST-OFFENSE POSSESSION OF MARIHUANA prior to 7/1/72</p>	<p>The statute provides that if no prior or subsequent drug conviction, defendant shall “upon petition to the court in which he was so convicted, have his record sealed.”</p> <p>Assuming that the <i>Pokaski</i> decision applies to such records, they may be sealed, or remain sealed, only upon a judicial order accompanied by specific findings that in this particular case sealing is necessary to achieve a compelling governmental interest that outweighs the public’s First Amendment presumption of access.</p>	<p>Available for imposing sentence for any subsequent violation of G.L. c. 94C.</p>
<p>G.L. c. 94C, § 44</p> <p>“NOT GUILTY” or “DISMISSED” or “NOL PROSSED” DISPOSITION OF A § 34 POSSESSION CHARGE</p>	<p>Section 44 provides that judge shall “order all official records relating to [the] arrest, indictment, conviction, continuance or discharge to be sealed” except non-public law enforcement records.</p> <p>Assuming that the <i>Pokaski</i> decision applies to such records, they may be sealed, or remain sealed, only upon a judicial order accompanied by specific findings that in this particular case sealing is necessary to achieve a compelling governmental interest that outweighs the public’s First Amendment presumption of access.</p>	<p>Section 44 is silent. But G.L. c. 276, § 85 provides that prior “not guilty” shall not be presented to the court for bail or sentencing purposes.</p>

FINDINGS AND ORDER ALLOWING MOTION TO SEAL RECORD under G.L. c. 276, § 100C or c. 94C, § 44	COURT DIVISION	Trial Court of Massachusetts District Court Department
DOCKET NUMBER(S)		
<p>After a final hearing on _____, _____, on the defendant's motion to seal the record(s) of the captioned case(s) under G.L. c. 276, § 100C or c. 94C, § 44, the Court finds, pursuant to <i>Globe Newspaper Co. v. Pokaski</i>, 868 F.2d 497 (1st Cir. 1989), and <i>Commonwealth v. Doe</i>, 420 Mass. 142 (1995), that sealing is necessary to effectuate a compelling governmental interest. The value to the defendant of sealing the record(s) clearly outweighs the constitutionally-based value of the record(s) remaining open to society because:</p> <p><input type="checkbox"/> 1. The specific harm threatened by the continued availability of the record is more than general reputation or privacy interests, specifically:</p> <div style="margin-left: 40px;"> <input type="checkbox"/> The defendant's position in society, i.e.: _____ </div> <div style="margin-left: 40px;"> <input type="checkbox"/> It is substantially possible that opportunities for schooling, employment or professional licenses are likely to be adversely affected by the availability of such record(s), i.e.: _____ </div> <div style="margin-left: 40px;"> <input type="checkbox"/> Other: _____ </div> <p><input type="checkbox"/> 2. The defendant's privacy interests have not been irretrievably lost.</p> <p><input type="checkbox"/> 3. The reason for the dismissal or nolle prosequi was as follows: _____</p> <p><input type="checkbox"/> 4. The victim's position on this motion is: _____</p> <div style="margin-left: 80px;"> <input type="checkbox"/> The victim was not notified. <input type="checkbox"/> There is no identifiable victim. </div> <p><input type="checkbox"/> 5. If this record remained accessible to the public, the defendant would suffer an unfair stigma because: _____</p>		
ORDER		
The Court therefore ORDERS that the defendant's motion to seal the record(s) of the captioned case(s) be ALLOWED and such records are hereby ordered to be SEALED.		
DATE	JUDGE <div style="text-align: center;">X</div>	

PETITION TO SEAL

TO: Commissioner of Probation, One Ashburton Place, Boston MA 02108

SELECT appropriate box(es). If 1, 2, or 3 are selected you must sign corresponding numbered affidavit below.

PART A

1 - 4

1

☐

Section 100B - Chapter 276. Delinquency (juvenile) cases, all sentence elements of which, and of any subsequent court appearances, were completed 3 years prior to this request.

2

☐

Section 100A - Chapter 276. Misdemeanor cases, all sentence elements of which, and of any subsequent court appearances, were completed 10 years prior to this request (or, which was a felony when committed, and is presently a misdemeanor).

Petition
to
Comm.
of
Probation

3

☐

Section 100A - Chapter 276. Felony cases, all sentence elements of which, and of any subsequent court appearances, were completed 15 years prior to this request.

4

☐

Section 100A - Chapter 276. Recorded offense which is no longer a crime, except where the elements of the offense continue to be a crime under a different designation.

Print

Last name First name Middle name

Date of Birth

Alias/Maiden/Previous name

Mailing Address

City

State

Occupation

Social Security #

Birthplace

Father's Name

Mothers Maiden Name

Husband or Wife

Signature

In accord with the provision of Chapter 276, Sections 100A, and 100B, as established by Chapter 686 of the Acts of 1971, Chapter 404 of the Acts of 1972 and Chapter 322 of the Acts of 1973, respectively, I hereby request that my record of adult criminal and/or juvenile Massachusetts court appearances and dispositions be sealed forthwith.

To the best of my knowledge:

1

☐

a) My delinquency court appearances or dispositions including court supervision, probation, commitment or parole, the records for which are to be sealed, terminated not less than three years prior to said request; b) I have not been adjudicated delinquent or found guilty of any criminal offense within the commonwealth in the three years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars nor been imprisoned under sentence or committed as a delinquent within the commonwealth within the preceding three years; and c) I have not been adjudicated delinquent or found guilty of any criminal offenses in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses as aforesaid, and have not been imprisoned under sentence or committed as a delinquent in any state or county within the preceding three years.

Signed under penalties of perjury,

Signature of petitioner

To the best of my knowledge:

2

☐

a) All of my court appearance and court disposition records, including termination of court supervision, probation, or sentence for any misdemeanor occurred not less than ten years prior to this request; b) that my court appearance and court disposition records, including termination of court supervision, probation or sentence for any felony occurred not less than fifteen years prior to this request; c) that I have not been found guilty of any criminal offense within the commonwealth in the ten years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars; d) I have not been convicted of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses as aforesaid, and have not been imprisoned in any state or county within the preceding ten years; and e) my record does not include convictions of offenses other than those to which the section applies, or convictions for violations of sections one hundred and twenty-one to one hundred-thirty one H, inclusive, of chapter one hundred and forty or for violations of chapter two hundred and sixty eight or chapter two hundred and sixty-eight A.

Signed under penalties of perjury,

Signature of petitioner

PETITIONER NOT TO WRITE BELOW THIS LINE

Petition Allowed/Disallowed

01

02

03

04

Allowed (Copy to Clerk and Probation Office)

Reason for Disallowance (Copy to petitioner only)



TRIAL COURT OF MASSACHUSETTS
OFFICE OF THE COMMISSIONER OF PROBATION
ONE ASHBURTON PLACE, ROOM 405
BOSTON, MASSACHUSETTS 02108
617-727-5300

Petition to court to seal record of adult criminal and/or juvenile Massachusetts court appearances and dispositions.

PETITIONER'S NAME:

(Print) _____ Date of Birth _____
(Last Name) (First Name) (Middle Name)

Alias/Maiden/Previous Name _____

Mailing Address _____
(Number) (Street) (City) (State) (Zip Code)

Birthplace _____ Father's Name _____ Mother's Maiden Name _____

- ☐ Section 100c - Chapter 276 (May Seal) Dismissed, except in cases where probation has been imposed. Nolle Prosequi, No Probable Cause, Not Guilty.
- ☐ Section 34 - Chapter 94C (Drug controlled substance). (May Seal). First offense.
- ☐ Section 34 - Chapter 94C (Drug controlled substance). (Shall Seal). Possession of marijuana, or controlled substance in Class E.
- ☐ Section 44 - Chapter 94C (Drug controlled substance). (Shall Seal). Not guilty, complaint dismissed or not pressed.
- ☐ Chapter 1102 of 1973 - Conviction of possession of marijuana prior to July 1, 1972. (Shall Seal).

Court No.	Docket No.	Court Appearance Date	Offense	Disposition

Date _____

Signature of Petitioner _____

Petitioner NOT To Write Below This Line

Petition Allowed/Disallowed

Instructions

Upon a hearing on this matter on _____

I find that SEALING WAS NECESSARY TO EFFECTUATE
A COMPELLING GOVERNMENTAL INTEREST.

Judge's Signature _____

Date _____

C.P.O. Signature _____

Rec'd by Commissioner of Probation _____

After the petition is allowed, send the white copy to the Clerk's Office, the yellow copy to the Commissioner of Probation and the pink copy to the petitioner.

All copies must be signed by the judge. The yellow copy must be signed by the Chief Probation Officer before being forwarded to the Office of the Commissioner of Probation.

III. EXPUNGEMENT OF CRIMINAL RECORDS

- *Definition.* Expungement involves “an order to remove and destroy records ‘so that no trace of the information remains.’”¹³⁰
- *Appeal.* A judge’s decision regarding the expungement of criminal records is appealable to the Appeals Court.¹³¹

NOT PERMISSIBLE TO EXPUNGE:

- *Criminal or juvenile records maintained by the clerk-magistrate’s office or the probation department.*¹³²
- *Criminal records to which the sealing statute is applicable.* A judge may not expunge the police or probation record of a criminal defendant in a situation governed by a sealing statute (G.L. c. 276, §§ 100A-100C).¹³³
- *Vacated abuse prevention orders.* A judge may not expunge entries from the registry of abuse prevention orders after an order is subsequently vacated,¹³⁴ with the exception noted below for orders obtained through a fraud on the court.

¹³⁰ *Police Comm’r of Boston v. Municipal Court of the Dorchester Dist.*, 374 Mass. 640, 648, 374 N.E.2d 272, 277 (1978). Permissible expungement orders must be limited to records which reveal the identity of an accused, and may not extend to “bookkeeping or administrative entries necessary for the preservation of departmental records, e.g. those showing the incident, receipt of a complaint, assignment of officers, and so on, or those necessary for statistical purposes.” *Id.*, 374 Mass. at 668 n.20, 374 N.E.2d at 288 n.20.

¹³¹ *Commonwealth v. Balboni*, 419 Mass. 42, 44 n.4, 642 N.E.2d 576, 577 n.4 (1994) (appeal by Commissioner of Probation); *Commonwealth v. S.M.F.*, 440 Mass. App. Ct. 42, 43 n.1, 660 N.E.2d 701, 702 n.1 (1996) (same).

¹³² *Commonwealth v. Gavin G.*, 437 Mass. 470, 772 N.E.2d 1067 (2002), held that, unlike the police records expunged in *Police Comm’r of Boston v. Municipal Court of the Dorchester Dist.*, 374 Mass. 640, 374 N.E.2d 272 [1978], “a detailed statutory scheme protects the confidentiality of . . . juvenile records maintained by the court and . . . the probation department” and “where such statutory or regulatory protections do exist, a Juvenile Court judge has no inherent authority to order expungement of the records.”

In dicta, the court expressed a broader prohibition on expunging either adult or juvenile records maintained by the clerk-magistrate’s office or the probation department: “Conspicuously absent from that entire legislative scheme governing court and probation records, whether for adults or juveniles, is any suggestion that the Legislature intended such records be destroyed As illustrated by G.L. c. 276, § 100C, the Legislature was not ignorant of the fact that some persons are wrongly accused of crime and wrongly brought before the courts on those charges. When addressing the precise predicament of a wrongfully accused adult unfairly acquiring a criminal record, the Legislature still opted for sealing, not destruction or expungement of records. As to both juveniles and adults, the Legislature is apparently satisfied with provisions for confidentiality and sealing of records to address the precise problem posed by such wrongful or mistaken accusations of criminal conduct.” *Id.*, 437 Mass. at 482-483, 772 N.E.2d at 1076.

¹³³ *Commonwealth v. Roe*, 420 Mass. 1002, 648 N.E.2d 744 (1995) (criminal case dismissed for want of prosecution); *Commonwealth v. Balboni*, 419 Mass. 42, 642 N.E.2d 576 (1994) (criminal case dismissed at complainant’s request); *Commonwealth v. Roberts*, 39 Mass. App. Ct. 355, 656 N.E.2d 1260 (1995) (criminal case dismissed at Commonwealth’s request).

¹³⁴ *Vaccaro v. Vaccaro*, 425 Mass. 153, 680 N.E.2d 55 (1997) (statute impliedly disallows expungement of vacated orders); *Smith v. Jones*, 67 Mass. App. Ct. 129, 852 N.E.2d 670 (2006) (same).

PERMISSIBLE TO EXPUNGE:

- *Mistaken identification of criminal defendant.* Where a criminal defendant has been charged and convicted under the assumed name of an innocent person, a judge has inherent authority to amend the complaint to read “John Doe” or “Jane Doe” and to order the Commissioner of Probation and the Criminal History Systems Board to expunge from their records the name and personal data of the innocent person.¹³⁵ “Steps to correct genuine inaccuracies in the probation record (e.g., to delete a notation of a default if the juvenile in fact appeared, or to correct the juvenile’s name), and steps to prevent the information in the record from being misleading, are permissible and appropriate.”¹³⁶
- *Fraudulently-obtained abuse prevention orders.* A judge may expunge entries from the registry of abuse prevention orders “in the rare and limited circumstance that the judge has found through clear and convincing evidence that the order was obtained through fraud on the court.”¹³⁷
- *Juvenile arrest records kept by police.* A judge has inherent authority to order the expungement of police arrest records in a delinquency case that was dismissed due to lack of evidence.¹³⁸

¹³⁵ *Commonwealth v. S.M.F.*, 40 Mass. App. Ct. 42, 660 N.E.2d 701 (1996) (since G.L. c. 276, § 100C is not available to the innocent person in this situation, it “falls into that residual category not covered by statute and as to which the inherent judicial power to expunge survives”; this is implicitly recognized in the reference in G.L. c. 6, § 171 to the “purging” of criminal offender record information “by the order of any court of competent jurisdiction”).

¹³⁶ *Commonwealth v. Gavin G.*, 437 Mass. at 483 n.13, 772 N.E.2d at 1076 n.13.

¹³⁷ *Commissioner of Probation v. Adams*, 65 Mass. App. Ct. 725, 737, 843 N.E.2d 1101 (2006) (order obtained through calculated pattern of false statements). “A ‘fraud on the court’ occurs where . . . a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense That a plaintiff presents a claim that fails does not mean that she has perpetrated a fraud on the court” (citation omitted). *Smith v. Jones*, 67 Mass. App. Ct. 129, 137-138, 852 N.E.2d 670, 678 (2006).

¹³⁸ *Police Comm’r of Boston*, *supra* (given special nature of juvenile proceedings, and since no statute governs dissemination of police records, judge may order expungement of juvenile’s name from police arrest records where delinquency charge was dropped for lack of evidence, if law enforcement interests in preserving records are minimal).